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INTERNATIONAL

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MARIN

CHURCH OF SCIENTOLOGY INTERNATIONAL, a California not-for-profit religious corporation; Plaintiffs, vs. GERALD ARMSTRONG; MICHAEL WALTON; et al., Defendants.	CASE NO. 157 680 NON-CALIFORNIA AUTHORITIES IN SUPPORT OF CHURCH OF SCIENTOLOGY INTERNATIONAL'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO GERALD ARMSTRONG'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION OF ISSUES
GERALD ARMSTRONG, Cross-Complainant, vs. CHURCH OF SCIENTOLOGY INTERNATIONAL, a California Corporation; DAVID MISCAVIGE; DOES 1 to 100; Cross-Defendant.	DATE: September 9, 1994 TIME: 9:00 a.m. DEPT: 1 TRIAL DATE: September 29, 1994

INDEX OF NON-CALIFORNIA AUTHORITIES

EXHIBIT A

documents were ever offered in evidence, either before the referee who determined the cause or the District Court.

The cause must be tried here upon the record made at the original trial. The rule cited has not for its purpose the introduction of new evidence even by stipulation, but only correction of the record to conform to truth by elimination of omissions and misstatements. A trial before a referee or a District Court would be a nullity if the record could be so changed here. Likewise, substantial injustice might be done to a litigant.

[4] The so-called Referee's Supplemental Certificate on Review and all documents and exhibits incorporated herein and the so-called motion to correct and supplement record and the documents accompanying are stricken from the files and no consideration will be given thereto in the disposal of this cause.

HEATH et al. v. HELMICK.
No. 11904.

United States Court of Appeals
Ninth Circuit.
March 4, 1949.

1. Bankruptcy ⇐372

Where referee in bankruptcy, after estate had been closed, reopened cause for administration of assets not fully administered, and district judge thereafter approved the reopening and found specifically that there were grounds therefor, the reopening was not improper though it would have been better practice to have presented the petition for reopening to the district judge. Bankr.Act, § 2, sub. a(8), 11 U.S.C.A. § 11, sub. a(8).

2. Bankruptcy ⇐438

Discharge of bankrupt does not preclude trustee from recovering or taking control of property belonging to estate and in which the creditors have an interest.

3. Bankruptcy ⇐288(15)

Finding by referee in bankruptcy that real property was an asset of estate at date of bankruptcy proceedings was a finding of ultimate fact on which summary jurisdiction of referee to deal with the property was properly founded.

4. Bankruptcy ⇐288(5)

Possession of property, either in bankrupt or an agent subject to control of bankrupt, on date of filing of petition for adjudication, establishes right of court to deal with claims thereto summarily, and it is only when possession is at that date held by an adverse claimant that trustee must resort to plenary suit in another forum.

5. Bankruptcy ⇐288(14)

Property was correctly found by referee in bankruptcy to be an asset of bankrupt estate, so that referee had power to summarily determine validity of claims by others to an interest therein.

6. Bankruptcy ⇐178(1)

Fraud perpetrated by a secret agreement between bankrupt, attorneys, and physician of bankrupt that property purchased by physician at execution sale be held by him until attorneys' fees were paid and until bankrupt was discharged in bankruptcy, when the property was to be returned to bankrupt, with the bankrupt in the meantime, left in possession and control, was sufficient to vitiate transaction.

7. Fraudulent conveyances ⇐113(1)

A conveyance with a secret reservation of benefit to debtor even through the forms of legal sale, is void as against creditors.

8. Fraudulent conveyances ⇐24(2)

Any action which delays creditors by depriving them of their normal recourse is fraudulent.

9. Bankruptcy ⇐288(14)

In proceeding by trustee in bankruptcy to establish that real property belonged to the bankrupt estate and that claims by others of an interest therein were invalid, evidence sustained finding of referee that secret fraudulent agreement was made be-

tween bankrupt and others, under which the property, after being sold on execution was to be retransferred to bankrupt after discharge, while bankrupt retained continuous possession, and that agreement was made after sale of the property on execution and before filing of petition for adjudication.

10. Judgment ⇐828(3.24)

Judgment of a state court in an action to quiet title was not binding in bankruptcy proceeding involving title to real property, in view of difference in parties and property affected.

11. Bankruptcy ⇐151

The trustee, as to property in possession of bankrupt at date of bankruptcy, is in position of a creditor holding a lien by legal or equitable proceedings, whether a creditor actually exists or not. Bankr. Act, § 70, sub. c, 11 U.S.C.A. § 110, sub. c.

12. Frauds, statute of ⇐139(1)

Provision in California statute of frauds relating to agreements not in writing and not to be performed within a year refers only to executory agreements. Civ. Code Cal. § 1624, subd. 4.

13. Bankruptcy ⇐178(1)

Secret agreement which was actually executed by retransfer of property to bankrupt after discharge in bankruptcy was fraudulent as to creditors, and ownership of the property by bankrupt estate could not be challenged on ground that agreement violated state statute of frauds. Bankr.Act., § 70, sub. c, 11 U.S.C.A. § 110, sub. c; Civ.Code Cal. § 1624, subd. 4.

14. Bankruptcy ⇐178(1)

Transfer of property with retention of possession in accordance with secret agreement and retransfer to bankrupt after discharge in bankruptcy, coupled with the withholding of final deed from record, compelled inference of fraud as matter of law.

15. Bankruptcy ⇐467(4)

Court of Appeals would be constrained to support the findings of a referee in bankruptcy who saw witnesses, where the findings were fully supported by the record and were concurred in by trial court on review.

Appeal from the United States District Court for the Southern District of California, Central Division; C. E. Beaumont, Judge.

Proceeding by Edna D. Heath, executrix of the last will of Fred W. Heath, deceased, and another against John N. Helmick, trustee of the estate of Melanie Douillard Woodd, bankrupt, for review of a determination by the referee that certain real property was an asset of the bankrupt's estate. From a judgment confirming the orders of the referee and adopting his findings and conclusions, the petitioners appeal.

Affirmed.

Ernest R. Utley and J. Geo Ohanneson, both of Los Angeles, Cal., for appellants.

Leslie S. Bowden and J. M. Clements, both of Los Angeles, Cal., for appellee.

Before MATHEWS and HEALY, Circuit Judges, and FEE, District Judge.

JAMES ALGER FEE, District Judge.

This controversy arises out of the bankruptcy proceeding initiated by the filing of a voluntary petition by Melanie Douillard Woodd, resulting in adjudication August 29, 1945.

On December 31, 1946, trustee presented a petition to the court to the effect that certain real property belonged to the bankrupt estate, that the Heath estate and one Knapp claimed an interest therein, but that the claim was invalid. An order to show cause issued to claimants. Based upon an extended hearing, where all parties were represented, the referee held that the real property was an asset of the estate and claimants had no interests therein. The order was dated May 3, 1947. The Honorable C. E. Beaumont heard the petition to review this order, and on December 1, 1947, confirmed the orders and adopted the findings and conclusions of the

referee.[1] The estates of Heath and Knapp[2] appeal, but Woodd does not.

The first question is as to the right of the referee to exercise summary jurisdiction over the property upon the petition of the trustee, after the discharge of the bankrupt and the closing of the estate. Neither of these propositions is squarely presented by the record, but each must be dealt with in order to solve questions formally argued in the briefs.

[1] The estate was closed. The referee reopened the cause for administration of the assets not fully administered. This has been a ground for reopening under the statutes ever since the adoption of the Bankruptcy Act.[3] There has been some question as to whether it can be done by referee or court. The question is a procedural one and has not been raised here. But the District Judge has now approved the reopening and has found specifically that there were grounds therefor. If a petition had been presented to him for reopening and he had granted it and referred the cause to the same referee for hearing and had affirmed the present result, no error would have been present. While it is by far the preferable practice for such petitions to be heard by a judge, in this instance there is no error.

[2-4] The bankrupt was discharged July 3, 1946. But the discharge of a bankrupt has never been held to preclude the trustee from recovering or taking control of the property belonging to the estate and in which, therefore, the creditors have an interest. Since the bankrupt has not appealed, the sole question is whether the property was owned by or in possession of the bankrupt when the petition for adjudication was filed.

The fee simple title to the property in question had formerly been in bankrupt Woodd and she had remained in continuous possession thereof. It was discovered during the course of the hearing that the property in question had been deeded to bankrupt Woodd, and the deed taken was recorded October 18, 1946, although it had been made and delivered September 12, 1946, two days after closure. The referee found, "The said real property was at the date of the bankruptcy proceedings an asset of the bankruptcy estate." Taken in connection with the evidence herein set out, this is a finding of ultimate fact.[4] The summary jurisdiction of the referee was founded. Possession either in bankrupt or an agent, subject to control of bankrupt, on the date of the filing of the petition for adjudication, establishes the right of the court to deal with claims thereto summarily. It is only when possession is at that date held by an adverse claimant that the trustee must resort to plenary suit in another forum. Once the fact of possession of bankrupt is established, the court determines all other claims to the property. Judge Healy, writing for this court in Bank of California, National Association v. McBride, 9 Cir., 132 F.2d 769, 771, says:

"The court had summary jurisdiction in the premises if, when the bankruptcy petition was filed, the property was actually or constructively in the possession of the bankrupt; or if at that time possession was held by a person who made no adverse claim to the property, or whose adverse claim was determined on inquiry to be merely colorable."

[5] Since it was thus correctly found that the property was an asset of the bankrupt estate, the referee had the power to consider the claims of the attorneys, Heath and Knapp. He correctly found that neither had any interest. The evidence supports his finding and conclusions.

The referee made specific findings, from which, supplemented by the testimony in the record, a complete picture may be had. Woodd had owned title to this real property, including the Virginia Avenue parcel here in suit and the Glendale tract, in 1940. Emile A. Douillard, a nephew, together with other relatives, had brought an action

[1] For preliminary matter, see Heath v. Helmick, 9 Cir., 173 F.2d 156.

[2] Knapp died also after the trial before the referee.

[3] 11 U.S.C.A. § 11, sub. a(8).

[4] The finding of ultimate fact was sufficient. Klinkiewicz v. Westminster Deposit & Trust Co., 74 App.D.C., 333, 122 F.2d 957, certiorari denied, 315 U.S. 805, 62 S.Ct. 633, 86 L.Ed. 1204; see also Brown Paper Mill Co. v. Irvin, 8 Cir., 134 F.2d 337, 338.

against Woodd in the state court to recover on account of her dealings with her mother's estate. Heath and Knapp were her attorneys in that litigation. The judge had indicated judgment would be against her. She considered this outrageously unjust but there were indications that such a judgment would be affirmed on appeal. She had money to pay her attorneys, Heath and Knapp, at the time, but she held a conference with them over their fee. There may have been some slight disagreement over the amount. Heath and Knapp agreed to bring a friendly suit and attach all her property, including the Glendale and Virginia Avenue parcels, before judgment could be entered by her relatives. This arrangement was secret. Heath and Knapp assigned their claims to Hovey, who was her confidant and physician, and action was brought in his name on April 11, 1940, and proceeded as if it were adverse. The properties were therein attached. Emile A. Douillard received separate judgment, foreshadowed by the remarks of the judge above mentioned, April 25, 1940, as did the other plaintiffs in that proceeding.

Judgment for Heath and Knapp in the name of Hovey was entered July 8, 1941, and execution issued. On August 3, 1942, the judgments of Douillards were affirmed by the Supreme Court of California.[5] On September 8, 1942, the Glendale property was sold under execution on the Hovey judgment. On March 15, 1943, Emile A. Douillard purchased the Glendale property at sheriff's sale on execution on his separate judgment. He then brought suit against Knapp, Heath, Hovey and Woodd to quiet title to this particular parcel on the ground that there had been a fraudulent transfer. This issue was decided against him. Douillard v. Smith, 70 Cal.App.2d 522, 161 P.2d 378. The particular property here under consideration (Virginia Avenue) was sold on sheriff's sale on the same execution April 12, 1943, and purchased by Dr. Hovey. The referee found that, after this last sale and before the filing of the petition for adjudication, Heath and Knapp, the attorneys, Dr. Hovey, the physician, and Woodd, the bankrupt, entered into a secret agreement that the property so purchased should be held by Hovey until the remainder of attorney fees were paid and until Woodd was discharged in bankruptcy, when the property was to be returned to bankrupt, "and in the meantime said bankrupt was to have the use and control of said property."

The evidence is uncontroverted that Dr. Hovey did not at the time have any interest in the claim or the judgment. He did not put up any money. When the sale was consummated, he was admittedly the holder of the bare legal title. Furthermore, it is admitted by all that he was trustee. Although there is no specific finding as to the value of the property (Virginia Avenue), there is the suggestion in the opinion of the referee that it was of much greater value than the original judgment.

[6] In due course, the petition was filed, discharge was granted and the estate was closed. Thereupon, the property was reconveyed to Woodd through her nephew and the deed recorded as above outlined. The proceeds of resale of Glendale property and many other sums went into the hands of Dr. Hovey. Some of this he appropriated himself. The overwhelming weight of evidence supports the findings that the attorneys were paid in full before the petition in bankruptcy was filed. But the actual fraud proven and found in the final secret agreement is sufficient to vitiate the transaction.

The badges of fraud with relation to creditors were early marked in the English mercantile community. Because of the pattern which such action took, the more notorious were denounced in the earliest enactments culminating in the statutes of Elizabeth.[6] In general, as here, action of a debtor attempting to defraud creditors will be found catalogued and indexed in Coke in what has been called his restatement of the law.[7] Twyne's Case[8] is a classic which delineates many devious

[5] Douillard v. Woodd, Cal.App., 120 P. 2d 73, affirmed 20 Cal.2d 665, 128 P.2d 6.

[6] 13 Eliz. c. 5, 27 Eliz. c. 4.

[7] Holdsworth, The Influence of Coke, Essays in Legal History, 303 ff.

[8] 3 Co. Rep. 80b.

devices.[9] These mediaeval authorities are not cited as binding precedents but to show that the propensities of the human heart bent on fraud are almost standard. Yesterday, today and tomorrow, the same tortuous trail can be followed by the same blazes.

[7, 8] A conveyance with a secret reservation, even through the forms of legal sale, arouses suspicion and is void as against creditors. Any action which delays creditors by depriving them of their normal recourse is fraudulent. Action which anticipates issuance of execution in pending litigation—pending issuance of the writ, as the older authorities say—is characteristic. A favorite device is an absolute conveyance, with the debtor left in possession of the property, upon some fictitious ground. Remaining in possession to collect the rent for the holder of the legal title, as here, is such a plausible pretext. Transactions among those who stand in a confidential relationship with the debtor are subject to especial scrutiny. Attorneys, confidants, physicians and relatives, who have interests in property formerly owned by debtor, are objects of distrust. Retransfer of property after debts have been wiped out is almost proof positive of chicanery.

One or more of such badges may be explained away, but in the concentration in which these exist here, fraud is written in bold letters over the transactions.

[9-11] The referee found the secret fraudulent agreement was made some time after the sale of the Virginia Avenue property on execution and before the filing of the petition for adjudication. There was substantial evidence to support this finding. The evidence shows that the design was fraudulent from the inception, as above noted, as to this particular property. The continuous possession by Woodd of this parcel before any litigation commenced, coupled with the retransfer and recording of the deed to her, differentiates this case from the Glendale property, which was alone involved in the Douillard litigation. When the state court failed to quiet title of Douillard to Glendale, no issue could have been decided which was binding upon this court, even if that judgment had been pleaded and proved, which was not the case. The parties are not the same. The positions are not identical. The trustee, as to property in possession of bankrupt at date of bankruptcy, as this was, is in the position of a creditor holding a lien by legal or equitable proceedings, whether a creditor actually exists or not.[10] Even if the trustee had failed in a suit to obtain possession of Glendale, this instant proceeding would not be affected. In a case where there was a finding that a transfer was not preferential, it was held not to preclude the bringing of a plenary action by the trustee to recover the property. In re Sears, Humbert & Co., 2 Cir., 128 F. 275, cited with approval in Standard Sanitary Mfg. Co. v. Momsen-Dunnegan-Ryan Co., 9 Cir., 51 F.2d 684, 685.

[12, 13] The confusion of thought on part of appellant is apparent in the ludicrous argument that the secret agreement between bankrupt and her confidential advisors and attorneys was violative of the Statute of Frauds[11] because it was not in writing and not to be performed within a year. The section referred to applies only to executory agreements. The actual transfer of this property to Woodd not only places the transaction beyond the statute but is proof positive of the "trust" for the benefit of Woodd and in fraud of her creditors. Since the agreement was executed and was fraudulent, the property is in the hands of the trustee and must be given to the creditors.

[14, 15] There is a suggestion that the referee was not justified in finding fraud. It is said that, whether the inference can be drawn from certain evidence is a question of law. But the trier of fact, who sees the witnesses is free to disbelieve them even if there is no flat contradiction. So here the referee, after he had before him the transfer of the property with the retention of possession in accordance with a secret agreement and a retransfer after

[9] For an enlightening discussion, see Glenn, Fraudulent Conveyances & Preferences, Vol. I, Chapter V(B).

[10] 11 U.S.C.A. § 110, sub. c.

[11] Civil Code of California, Sec. 1624, Par. 4.

discharge in bankruptcy, coupled with the withholding of the final deed from record, was compelled to make the inference of fraud as a matter of law. In any event, this court would be constrained to support the findings of a referee who saw the witnesses, where these are fully supported by the record and are concurred in by the trial court on review.[12] It would have been error for the referee to have found otherwise.

The judgment of the District Court is affirmed.

BROWN v. WARNER.

WARNER v. BROWN.

No. 12217.

United States Court of Appeals
Fifth Circuit.

March 8, 1949.

Rehearing Denied April 4, 1949.

1. Appeal and error ⇐173(6)

The defense of illegality of note sued on could not be urged on appeal where defense was unsupported by either pleading or proof and was not made in the District Court. Federal Rules of Civil Procedure, rule 8(c), 28 U.S.C.A.

2. Corporations ⇐116, 187

Where three stockholders agreed that, in event of failure of corporation to repay money advanced by one of stockholders to corporation, each stockholder would be liable for advance in proportion to stockholder's interest in corporation, defendant stockholder giving note to plaintiff for plaintiff's stock was liable for full amount of such note subject to defendant's right to recover, from plaintiff, one-third of any loss suffered by corporation's failure to repay money advanced by defendant.

Appeal from the United States District Court for the Northern District of Texas; William H. Atwell, Judge.

Action on notes by Robert H. Warner against Leila O. Brown. The defendant filed a cross-action. The plaintiff filed a cross-bill. From the judgment, the defendant appeals and the plaintiff cross-appeals.

Affirmed as reformed.

Otis Bowyer, Jr., of Dallas, Tex., for appellant.

Wm. Madden Hill, of Dallas, Tex., for appellee.

Before HUTCHESON, HOLMES, and LEE, Circuit Judges.

HUTCHESON, Circuit Judge.

This appeal and cross-appeal bring up controversies between two stockholders in Big State Vending Company, a corporation engaged generally in manufacturing and selling vending machines. They began in a suit by appellee on a promissory note for $4000.

Appellant, admitting its execution, denied liability on it, and, by cross-action, sued for sums in excess of appellee's claim against her.

Her defenses to the note were: that it had been given for appellee's one-third of the stock in the company, of which appellee was president; that the stock was worthless and known by appellee to be so; that she had been induced by fraud to buy the stock and execute the note; and that there was a total failure of consideration.

Her cross-action was for amounts claimed to be due to her for monies advanced by her to the corporation upon the understanding that, if the corporation didn't pay it, each stockholder would be liable for the advance in proportion to his interest in the company, and there was also a claim for damages for fraud and over-reaching.

Appellee denied all the charges of fraud and over-reaching, and all of appellant's claims by way of cross-bill.

The cause was tried to the court without a jury, and there was a judgment for appellee for part of his demand, to-wit, $2,656.59, including therein principal, interest, and $200 attorney's fees, and against appellant on her cross-action, except as indicated by the reduced amount awarded appellee.

[12] Kimm v. Cox, 8 Cir., 130 F.2d 721; Goldstein v. Polakof, 9 Cir., 135 F.2d 45.

EXHIBIT B

In the Matter of LIQUIMATIC SYSTEMS, INC., a California corporation, Bankrupt.

No. 101084.

United States District Court
S. D. California,
Central Division.

May 31, 1961.

Bankruptcy proceedings. Two creditors petitioned for review of an adverse order of the referee. The District Court, Byrne, J., held that transfer of money and notes by bankrupt corporation, to creditors, for their partnership interest, more than four months prior to bankruptcy of corporation, could not be set aside by trustee as fraudulent, where there was no evidence from which it could be inferred that in entering into the transaction bankrupt had actual intent to defraud creditors.

Order reversed.

1. Courts ⇐359

Validity of bankrupt's transfer of property made more than four months before bankruptcy, and attacked under section of the Bankruptcy Act pertaining to voidable transfers, must be determined by state law, and if a creditor of the bankrupt could have avoided the transfer under state law, the trustee may do the same. Bankr.Act, § 70, sub. e(1, 2), 11 U.S.C.A. § 110, sub. e(1, 2).

2. Fraudulent Conveyances ⇐237(1)

Under the Uniform Fraudulent Conveyance Act, a creditor may set aside a conveyance by his debtor which is fraudulent as to the creditor. West's Ann.Cal. Civ.Code, §§ 3439.01–3439.12, 3439.04, 3439.07.

3. Fraudulent Conveyances ⇐57(3), 76(1)

Under Uniform Fraudulent Conveyance Act, actual intent of transferor is immaterial, and a conveyance is conclusively presumed fraudulent as to creditors of transferor if the conveyance is made without fair consideration while the transferor is insolvent, or if he is by the conveyance rendered insolvent. West's Ann.Cal.Civ.Code, § 3439.04.

4. Fraudulent Conveyances ⇐61

Insolvency must exist at time of transfer or must result therefrom, to render a transfer fraudulent as to creditors. West's Ann.Cal.Civ.Code, § 3439.-04.

5. Fraudulent Conveyances ⇐272

Generally, solvency and not insolvency is to be presumed, and subsequent insolvency is not in itself sufficient foundation for an inference of insolvency at time of conveyance.

6. Fraudulent Conveyances ⇐74(1)

A conveyance without consideration is not fraudulent as to creditors if made at a time when the transferor was solvent.

7. Fraudulent Conveyances ⇐64(1), 69(1)

Under Uniform Fraudulent Conveyance Act, a transfer made with actual intent to defraud creditors is fraudulent as to any creditor, regardless of whether transferor was insolvent at the time of transfer, question of actual intent being of controlling importance. West's Ann. Cal.Civ.Code, § 3439.07.

8. Fraudulent Conveyances ⇐16, 273

An actual intent to defraud creditors is not usually found from existence of any given set of facts, but must be proved, and a court may not declare a transaction void because of badges of fraud although proof may be made by inferences from circumstances surrounding the transaction and relationship and interests of parties.

9. Bankruptcy ⇐180

Transfer of money and notes by bankrupt corporation, to creditors, for their partnership interest, more than four months prior to bankruptcy of corporation, could not be set aside by trustee as fraudulent, where there was no evidence from which it could be inferred that in entering into the transaction bankrupt had actual intent to defraud creditors. Bankr.Act, § 70, sub. e, 11

U.S.C.A. § 110, sub. e; West's Ann.Cal. Civ.Code, §§ 3439.01–3439.12, 3439.04, 3439.07.

10. Bankruptcy ⇐184(1)

Trustee in bankruptcy could not set aside a conveyance of $25,000 by bankrupt corporation, made more than four months prior to bankruptcy, on ground that such conveyance was not authorized by board of directors as required by California law in event of a conveyance of all or substantially all of a corporation's assets, where there was nothing in the record to indicate that $25,000 constituted all or substantially all of corporation's assets at time of conveyance. West's Ann.Cal.Corp.Code, § 3901(b); Bankr.Act, § 70, sub. e(1, 2), 11 U.S.C.A. § 110, sub. e(1, 2).

Lillick, Geary, McHose, Roethke & Myers, Los Angeles, Cal., for petitioners and claimants.

C. E. H. McDonnell, Los Angeles, Cal., for trustee.

BYRNE, District Judge.

Prior to March 1956, Earl Spangler, as a sole proprietor, was engaged in the business of manufacturing devices for metering and storing liquid food products. These devices were designed by Spangler and were based upon, and incorporated, patents which he owned.

In March 1956, Spangler entered into a partnership agreement with Heber C. Erickson and Harry E. Erickson, the claimants and petitioners herein. Under this agreement, Spangler kept 55% of the business, putting all of the business' assets and the patents into the partnership. The Ericksons became limited partners, acquiring 45% of the business, contributing $10,000 each, and agreeing to guarantee bank loans. The resulting partnership, composed of Spangler and the Ericksons, was known as Liquimatics Systems.

The partnership carried on business for the remainder of 1956, expanding the business but losing all of its invested capital. For the calendar year 1957 the partnership grossed $352,856.79 and netted $3,421.90.

In June 1957, Spangler and one David Difley proposed to the Ericksons that the business be expanded and incorporated. The Ericksons were not interested in this proposal and Spangler and Difley offered to buy their partnership interest for $25,000. Consequently, on August 6, 1957, the Ericksons gave Spangler an option, exercisable within six months, to buy their 45% interest in the partnership for $25,000.

After having located several interested investors, Spangler and Difley on August 13, 1957, formed Liquimatics Systems, Inc., the bankrupt corporation herein. The sole purpose of this corporation was ostensibly to buy, finance and operate the business owned by the partnership, Liquimatics Systems.

By letter dated January 29, 1958, Spangler advised the Ericksons that he intended to exercise the option of August 6, 1957, and buy their 45% interest in the partnership. Accordingly, on February 20, 1958, Spangler, as president of the corporation, entered into an agreement with the Ericksons whereby they transferred to the corporation their 45% interest in the partnership, and each received from the corporation a total of $12,500 ($6,250 cash and a note in the same amount).

Liquimatics Systems, Inc., carried on business until July 31, 1959, when it filed its petition for leave to file proceedings under Chapter XI of the Bankruptcy Act, 11 U.S.C.A. § 701 et seq. On November 24, 1959, the debtor corporation being unable to file or present to its creditors a plan of arrangement, an order of adjudication was entered.

On May 18, 1960, Harry E. Erickson and Heber C. Erickson each filed in the bankruptcy proceedings his unsecured claim for $6,250 plus interest thereon at 6% per annum from May 21, 1959, which claims are founded upon the promissory notes of the bankrupt corporation dated February 21, 1958.

On July 27, 1960, A. J. Bumb, the trustee in bankruptcy, filed his objections to each of these claims and prayed for an affirmative judgment that Heber and Harry Erickson each pay to the bankruptcy estate the sum of $6,250 which had previously been paid to each of them by the bankrupt corporation. The trustee's objections to the claims of the Ericksons, and his request for affirmative judgment against them, were based upon the contention that in the transaction of February 20, 1958, the Ericksons had sold to the bankrupt corporation a worthless business for a total of $25,000, half of which was paid in cash and half by the notes.

The Referee sustained the trustee's objections to the claims of the Ericksons and granted the affirmative judgment prayed for by the trustee. On February 8, 1961, the Ericksons filed their petition for review by this court of the referee's order.

Neither Section 60 ("Preferred creditors") nor Section 67 ("Liens and fraudulent transfers") of the Bankruptcy Act (11 U.S.C.A. §§ 96 and 107) is applicable in this case because these sections apply only to transactions made within four months of bankruptcy, and the transaction here set aside by the referee took place in February 1958, some seventeen months before the commencement of the bankruptcy proceedings in July 1959. Therefore, the referee apparently based his decision upon Section 70, sub. e of the Bankrupcty Act (11 U.S.C.A. § 110, sub. e).[1]

[1] The validity of the bankrupt's transfer of property made more than four months before bankruptcy, and attacked under 11 U.S.C.A. § 110, sub. e, must be determined by state law; if a creditor of the bankrupt could have avoided the transfer under state law, the trustee may do the same. Stellwagen v. Clum, 1918, 245 U.S. 605, 38 S.Ct. 215, 62 L.Ed. 507; Irving Trust Co. v. Kaminsky, D.C.S.D.N.Y.1937, 19 F.Supp. 816.

Thus, it is necessary to turn to California law in order to determine whether the transfer of money and notes by the bankrupt corporation to petitioners on February 20, 1958, could be set aside by the bankrupt's creditors, and hence by the trustee.

[2] Under the Uniform Fraudulent Conveyance Act, §§ 3439.01 to 3439.12, inclusive, of the California Civil Code, a creditor may set aside a conveyance by his debtor which is fraudulent as to the creditor.

There are two sections of the Act which define conveyances fraudulent as to the creditor:

"§ 3439.04. Conveyances, etc., deemed fraudulent: Transaction rendering debtor insolvent. Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation incurred without a fair consideration."

"§ 3439.07. Transaction entered into with intent to hinder or defraud creditors. Every conveyance made and every obligation incurred with actual intent, as distinguished from

1. "§ 110. Title to property
* * * * *
"(e)(1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this title which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this title, shall be null and void as against the trustee of such debtor.
"(2) All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate: * * * The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whoever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision is valid under applicable Federal or State laws."

> intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."

It may be noted parenthetically that the term "conveyance" as used in the Act includes the payment of money. California Civil Code § 3439.01.

It must now be determined whether either of these sections would enable a creditor of the bankrupt corporation herein to set aside the corporation's transfer of money and notes to petitioners on February 20, 1958.

[3] Under § 3439.04, the actual intent of the transferor is immaterial: the conveyance is conclusively presumed fraudulent as to his creditors if the conveyance is made without fair consideration while the transferor is insolvent, or if he will by the conveyance be rendered insolvent. In re Boggs' Estate, 1942, 19 Cal.2d 324, 121 P.2d 678; Allee v. Shay, 1928, 92 Cal.App. 749, 268 P. 962; Benson v. Harriman, 1921, 55 Cal.App. 483, 204 P. 255.

[4–6] Insolvency must exist at the time of the transfer or must result therefrom, to render the transfer fraudulent as to creditors. Miller v. Keegan, 1949, 92 Cal.App.2d 846, 207 P.2d 1073. As a general rule, solvency and not insolvency is to be presumed, Id., and subsequent insolvency is not in itself sufficient foundation for an inference of insolvency at the time of the conveyance. Tainter v. Broderick Land & Investment Co., 1918, 177 Cal. 664, 171 P. 679. In the instant case the referee made no finding, and there is nothing in the record to indicate, that the bankrupt corporation was insolvent when it conveyed the notes and cash to petitioners, or was rendered insolvent by the conveyance. Therefore, § 3439.04 does not render fraudulent the corporation's conveyance of cash and notes even if the consideration received by the corporation was inadequate, because a conveyance without consideration is not fraudulent as to creditors if made at a time when the transferor was solvent. Tokar v. Redman, 1956, 138 Cal. App.2d 350, 291 P.2d 987; Fissel v. Monroe, 1917, 33 Cal.App. 756, 166 P. 607; White v. Besse, 1904, 145 Cal. 223, 78 P. 649; Morgan v. Hecker, 1888, 74 Cal. 540, 16 P. 317.

[7] Under § 3439.07 a transfer made with actual intent to defraud creditors is fraudulent as to any creditor, regardless of whether the debtor-transferor was insolvent at the time of the transfer. Freeman v. La Morte, 1957, 148 Cal.App. 2d 670, 307 P.2d 734; Security-First Nat. Bank of Los Angeles v. Bruder, 1941, 44 Cal.App.2d 767, 113 P.2d 3; Adams v. Bell, 1936, 5 Cal.2d 697, 56 P.2d 208; Alpha Hardware & Supply Co. v. Ruby Mines Co., 1929, 97 Cal.App. 508, 275 P. 984.

In order to enable the corporation's creditors, and hence the trustee, to set aside the conveyance under § 3439.07, it must appear that the transferor corporation made the conveyance with actual intent to hinder, delay or defraud present or future creditors. The question of actual intent is of controlling importance under this section. Millard v. Epsteen, 1943, 58 Cal.App.2d 612, 137 P.2d 717.

[8] An actual intent to defraud creditors is not usually found as a matter of law from the existence of any given set of facts, but must be proved just as any other material fact. The court must infer or find the existence of a fraudulent intent from the evidence, and may not declare the transaction void as a matter of law because of the appearance of what are frequently called "badges of fraud". However, because of the nature of an action to set aside a conveyance, direct proof of the fraudulent intent of the parties is often impossible. For this reason, and because the intent of the parties and the facts of the transaction are peculiarly within the knowledge of those sought to be charged with fraud, proof must come by inference from the circumstances surrounding the transaction and the relationship and interests of the parties. Indicia of fraud that might be insufficient when considered separately may, by their number and association when considered

together, suffice as strong evidence of fraudulent intent. See 23 Cal.Jur.2d, Fraudulent Conveyances § 40, pages 489–490, and cases cited therein.

The referee detected what he considered "badges of fraud" in the activities of Spangler and thought that the Ericksons "realized that they had made a very poor deal" and wanted to "get out".[2] No doubt petitioners escaped from an unprofitable venture by selling their partnership interest to the corporation for $25,000. However, when all of the circumstances surrounding the conveyance are considered, it is difficult, if not impossible, to find any actual intent on the part of the corporation to defraud its creditors by paying the Ericksons $25,000 for their 45% interest in the partnership. It is not alleged or shown by the record that the corporation had any creditors at the time of the conveyance and the principal immediate "future creditor" indicated at the time was the Bank of America National Trust and Savings Association. The Bank apparently did not think there was any intent to defraud. Indeed it released the Ericksons as guarantors of a $45,000 loan and accepted the corporation in lieu thereof.[3] With the facilities for investigation which were available to the Bank it apparently determined that the corporation was a good credit risk.

[9] The referee made no finding as to fraud on anyone's part, but concluded as a matter of law that petitioners' sale of their partnership interest was fraudulent. This conclusion cannot stand, inasmuch as the record is entirely devoid of evidence from which the transferor's actual intent to defraud its creditors can be inferred.

The referee made a finding that the Board of Directors of the corporation had never authorized the purchase of the Ericksons' interest in the partnership and concluded that the transaction was therefore void.

California Corporations Code § 3901 (b) provides that a corporation shall not sell, lease, convey, exchange, transfer, or otherwise dispose of all or substantially all of its property and assets except under authority of a resolution of its board of directors and with the approval of the principal terms of the transaction and the nature and amount of the consideration by vote or written consent of shareholders entitled to exercise a majority of the voting power of the corporation. It has been held that this section was enacted for the benefit of the stockholders and creditors of the selling corporation, and that they alone can object to the mode of transfer. Solorza v. Park Walter Co., 1948, 86 Cal.App.2d 653, 195 P. 2d 523; Gunther v. Thompson, 1931, 211 Cal. 631, 296 P. 611.

[10] There is nothing in the record to indicate that $25,000 constituted all, or substantially all, of the corporation's assets at the time of the conveyance. Hence, a creditor of the corporation could not attack its conveyance of $25,000 to petitioners on the ground that such conveyance was not authorized by the board of directors. It follows that the trustee

2. (Pages 2–5 Transcript of proceedings of December 22, 1960) "The Referee: Well, one point in this case, counsel, that strikes me is that it was just basically a fraudulent transaction right from the beginning. I am going to let my hair down and be frank. I think that everything Mr. Spangler had had his finger in as far as this case is concerned smells of fraud * * *. The only one who has ever profited in any way in any of these transactions is Mr. Spangler, and he has rather consistently profited, to the extent of $1500.00 a month that he has drawn out. * * * There are certain badges of fraud that I see in this case, and while Mr. Spangler is the chief actor as far as all of this fraud goes, the Ericksons had certain knowledge of the situation which is determinative of their rights * * * I think * * * they realized that they had made a very poor deal * * * and they * * * wanted to get out."

3. (Page 5 Transcript of proceedings of December 22, 1960) "The Referee: But they were liable at that time for $45,000.00, and the bank wouldn't release them until the bank had satisfied itself the corporation was taking over these obligations * * *"

likewise cannot set aside the conveyance on this ground because 11 U.S.C.A. § 110, sub. e gives the trustee no greater rights than the bankrupt's creditor possesses; if the creditor cannot succeed in setting aside the conveyance under the applicable state law, neither can the trustee succeed.

The referee's order of February 2, 1961, sustaining the trustee's objections to petitioners' claims, disallowing the claims and directing each petitioner to pay the trustee the sum of $6,624.98, is reversed. Counsel for petitioners is directed to prepare, serve and lodge a formal order pursuant to local Rule 7, West's Ann.Cal.Code.

Roy Charles RUNDLE, Plaintiff,

v.

Robert Lee WYRICK et al., Defendants.

Robert M. BREWER, Plaintiff,

v.

Roy Charles RUNDLE, Defendant.

Mrs. Evelyn RUNDLE, Plaintiff,

v.

Robert Lee WYRICK et al., Defendants.

Civ. A. Nos. 163–G–59, 164–G–59, 101–G–60.

United States District Court
Middle District North Carolina,
Greensboro Division.
June 19, 1961.

Action arising out of collision between defendants' automobile, which allegedly was stopped in northbound lane behind automobile waiting to make left turn, and southbound truck after plaintiffs' automobile was driven into southbound lane by rear end impact of another automobile. The District Court, Hayes, J., after verdict for plaintiff against various defendants and on defendants' motion for new trial, held, inter alia, that evidence was sufficient to support finding that defendant driver had been negligent in failing to stop or avoid collision when he could have foreseen that his lane would be encroached upon.

Motion denied.

1. Federal Civil Procedure ⇐2152

If evidence and legitimate inferences to be drawn raise issue of fact, it is duty of court to submit issues to jury.

2. Automobiles ⇐150

Under North Carolina law, driver is responsible not only for what he saw, but what he could have seen if he had kept constant outlook in direction he was traveling, by exercising ordinary care.

3. Automobiles ⇐170(12)

Under North Carolina law, a motorist, although in proper lane of traffic, must exercise ordinary care to avoid injuring persons or vehicles in his lane if he discovers that peril or if he could have discovered it by exercise of ordinary care.

4. Automobiles ⇐244(10)

Evidence in action arising out of collision between defendants' southbound truck and plaintiffs' northbound automobile which allegedly was forced into defendants' lane when struck from behind by second automobile, was sufficient to support finding that defendant driver had been negligent in failing to stop or avoid collision when he could have foreseen that his lane would be encroached upon.

5. Automobiles ⇐146

Under North Carolina law, a driver may be liable if, by exercise of ordinary care, he might have foreseen that some injury would result from his act or omission, or that consequences of generally injurious nature might have been expected.

6. Negligence ⇐62(3)

Under North Carolina law, doctrine of insulating negligence of third party

EXHIBIT C

UNITED STATES of America, Appellee,

v.

Donald Nixon RUSH, Larry Joseph Lancelotti, Gregory Lee Lancelotti, Harry J. Shnurman, Robert Michael Cohen, Thomas G. Converse, David Earl Johnson, Irving F. Imoberstag, Carl Eric Olsen, Jacob Shnurman, Randall Collins, Jeffrey Allen Brown, and David Nissenbaum, Defendants, Appellants.

UNITED STATES of America, Appellee,

v.

Michael Lee RISOLVATO, Defendant, Appellant.

UNITED STATES of America, Appellee,

v.

Charles LEATON, Defendant, Appellant.

Nos. 83–1177, 83–1391 and 83–1463.

United States Court of Appeals, First Circuit.

Argued May 11, 1984.

Decided June 27, 1984.

Petitions for Rehearing Denied July 26, 1984.

Fifteen defendants were convicted in the United States District Court for the District of Maine, Edward Thaxter Gignoux, Senior District Judge, on one or both counts under two-count indictment charging possession of marijuana with intent to distribute and conspiracy to possess marijuana with intent to distribute, and they appealed. The Court of Appeals, Bownes, Circuit Judge, held that: (1) defendants' rights under Speedy Trial Act were not violated; (2) First Amendment free exercise of religion clause did not protect defendants' possession of marijuana with intent to distribute on ground that use of the marijuana was an integral part of their religious practice; (3) defendants, as members of religious group for whom use of marijuana was integral part of their religious practice, were not entitled as matter of equal protection to religious exemption from marijuana laws on same terms as peyote exemption granted Native American Church; (4) trial court did not abuse its discretion in denying severance motions; (5) evidence was sufficient to sustain convictions; and (6) trial court adequately investigated possibility of jury taint.

Affirmed.

1. Criminal Law ⇐577.10(4)

Exclusion of time for pretrial motions in computing time within which trial must commence under Speedy Trial Act is automatic; a showing of actual delay is not required. 18 U.S.C.A. § 3161(h)(1)(F).

2. Criminal Law ⇐577.10(8)

Time from defendants' filing of pretrial motion to preserve evidence to date of hearing on that motion was excludable in computing time within which trial had to commence under Speedy Trial Act. 18 U.S.C.A. § 3161(h)(1)(F).

3. Criminal Law ⇐577.10(4, 8)

Where Government filed pretrial motion for "order permitting destruction of seized marijuana" on October 24, 1980, where starting point for computing speedy trial limit was October 30, 1980, and where defendants filed motion to preserve evidence on November 7, 1980, time from October 30 until November 7 was excludable in computing time within which trial was to commence under Speedy Trial Act. 18 U.S.C.A. § 3161(h)(1)(F).

4. Criminal Law ⇐577.10(8)

Where codefendants filed suppression motions on November 21, 1980, Government filed opposition on February 4, 1981, evidentiary hearing was held on February 23–26, and oral argument took place on March 17, 1981, time from November 21, 1980, through March 17, 1981, was "reasonably necessary" delay, and thus, the entire period was excludable for purpose of computing time limit under Speedy Trial Act. 18 U.S.C.A. § 3161(h)(1)(F).

5. Criminal Law ⇐577.10(5)

Speedy Trial Act provision for reasonable period of delay when defendant is joined for trial with a codefendant as to whom time for trial has not run and no motion for severance has been granted stops speedy trial clock for one defendant in same manner and for same amount of time as for all codefendants. 18 U.S.C.A. § 3161(h)(7).

6. Criminal Law ⇐577.10(8)

Exclusions of periods of delay resulting from pretrial motions from computing time limits under Speedy Trial Act applied to all codefendants as to whom no motion for severance had been granted. 18 U.S.C.A. § 3161(h)(1)(F), (h)(7).

7. Criminal Law ⇐577.10(5)

Although trial court's order conditionally severed trials of several codefendants, speedy trial time exclusions under Speedy Trial Act provision for exclusion of reasonable period of delay when defendant is joined for trial with codefendant as to whom time for trial has not run and no motion for severance has been granted would be computed, with respect to proceedings after entry of the order, as if the severance motion had been denied at the outset, where the precondition for severance never came about and the severance order never became effective. 18 U.S.C.A. § 3161(h)(1)(F).

8. Criminal Law ⇐577.10(4)

Automatic exclusion from computation of speedy trial limits for delay reasonably attributable to any period, not to exceed 30 days, during which any proceeding concerning defendant is actually under advisement by the court cannot be extended beyond 30 days without resort to another source of excludable time, such as an "ends of judgment" continuance under Speedy Trial Act provision. 18 U.S.C.A. § 3161(h)(1)(J), (h)(8).

9. Criminal Law ⇐577.10(4)

Of 98 days that elapsed between oral argument and ruling on suppression motions, only 30 were excludable under provision of Speedy Trial Act for exclusion of period during which any proceeding concerning defendant is actually under advisement by the court. 18 U.S.C.A. § 3161(h)(1)(J).

10. Criminal Law ⇐577.10(4)

Pretrial offer of proof was not pretrial motion as would trigger Speedy Trial Act provision for exclusion of time for pretrial motions. 18 U.S.C.A. § 3161(h)(1), (h)(1)(F).

11. Criminal Law ⇐577.10(5)

Speedy trial clock stopped while ten of codefendants in case were being tried on similar charges in another court. 18 U.S.C.A. § 3161(h)(1)(D).

12. Criminal Law ⇐615

Although reasons for grant of continuance under provision of Speedy Trial Act must be reasonably explicit, they need not be given at time the continuance is granted; purposes of the requirement, to ensure careful consideration of relevant factors by trial court and to provide reviewable record on appeal, are both served if text of the order, taken together with more detailed subsequent statements, adequately explain factual basis for the continuance under relevant criteria. 18 U.S.C.A. § 3161(h)(8).

13. Criminal Law ⇐611

Although trial court may not merely incorporate by reference reasons for granting continuance under provision of Speedy Trial Act, it is not necessary for the court to articulate basic facts where they are obvious and set forth in motion for continuance. 18 U.S.C.A. § 3161(h)(8).

14. Criminal Law ⇐581

Trial court's grant of continuance because of trial of several codefendants on similar charges in another court was properly grounded in relevant criteria under Speedy Trial Act provision for exclusion of period of delay resulting from continuance. 18 U.S.C.A. § 3161(h)(8)(B), (h)(8)(B)(i, ii, iv).

15. Criminal Law ⇐577.10(8)

Although defendants do not bear primary responsibility for alerting trial court

to speedy trial deadlines, defendants may not deliberately obtain continuance for their own convenience in face of speedy trial concerns articulated by trial court and then later claim that the court abused its discretion in granting the requested continuance. 18 U.S.C.A. § 3161(h)(8).

16. Criminal Law ⇐615

It is generally preferable to limit a continuance to a definite period for sake of clarity and certainty. 18 U.S.C.A. § 3161(h)(8).

17. Criminal Law ⇐577.10(4)

Even if trial court's open-ended continuance, granted under Speedy Trial Act provision for exclusion of periods of delay resulting from continuance, and granted because of trial of several of the codefendants in the case in another jurisdiction, was construed to last for only 30 days from end of the other trial, there was no Speedy Trial Act violation. 18 U.S.C.A. §§ 3161 et seq., 3161(h)(8).

18. Criminal Law ⇐577.10(8)

Time from filing of two defendants' motions to dismiss on double jeopardy grounds through date on which court ruled on both of the motions was excludable under Speedy Trial Act with respect to all codefendants in the case, aside from severed defendants. 18 U.S.C.A. § 3161(h)(1)(E, J), (h)(7).

19. Criminal Law ⇐577.10(8)

Automatic exclusion took effect under Speedy Trial Act from date on which several codefendants in case filed their interlocutory appeal from trial court's denial of motion to dismiss on double jeopardy grounds. 18 U.S.C.A. § 3161(h)(1)(E).

20. Criminal Law ⇐577.10(8)

In case in which two of several codefendants took interlocutory appeal and records of the two codefendants were kept together, at least with implied consent of both defendants, in the Court of Appeals until second appeal was finally decided, speedy trial clock stopped with respect to all codefendants through date on which Court of Appeals issued its mandate in the second appeal. 18 U.S.C.A. § 3161(h)(1)(E), (h)(7).

21. Criminal Law ⇐577.1

Provision of Speedy Trial Act that trial shall not commence less than 30 days from date on which defendant first appears through counsel was not violated where defendants were promptly arraigned on original indictment in 1980 and where trial began on December 7, 1982, notwithstanding fact that defendants were arraigned on superceding indictment on day before trial, in that defendants rejected one-week continuance offered by trial court on December 6, 1982, and defendants appeared to be entirely responsible for delay in their arraignment. 18 U.S.C.A. § 3161(c)(2).

22. Constitutional Law ⇐84(1)

Absolute constitutional protection afforded freedom of religious beliefs does not extend without qualification to religious conduct. U.S.C.A. Const.Amend. 1.

23. Constitutional Law ⇐84(1)

When a law is challenged as interfering with religious conduct, constitutional inquiry involves questions whether the challenged law interferes with free exercise of a religion, whether the challenged law is essential to accomplish an overriding government objective, and whether accommodating the religious practice would unduly interfere with fulfillment of the governmental interest. U.S.C.A. Const. Amend. 1.

24. Constitutional Law ⇐84.5(7)

First Amendment free exercise of religion clause did not exempt from marijuana laws members of religious group for whom use of marijuana was integral part of their religious practice. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(b)(6), 406, 21 U.S.C.A. §§ 841(b)(6), 846; U.S.C.A. Const.Amend. 1.

25. Constitutional Law ⇐250.1(1)

Members of religious group for whom use of marijuana was integral part of their religious practice were not entitled as matter of equal protection to religious exemption from marijuana laws on same terms as

peyote exemption granted the Native American Church. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(b)(6), 406, 21 U.S.C.A. §§ 841(b)(6), 846; U.S.C.A. Const.Amends. 1, 14.

26. Criminal Law ⇐622.2(1)

In prosecution for conspiracy to possess marijuana with intent to distribute and for possession of marijuana with intent to distribute, trial court did not abuse its discretion in denying severance to two groups of eight defendants, one of which asserted defense contesting both elements of possession and intent, the other of which contested only the element of intent. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(b)(6), 406, 21 U.S.C.A. §§ 841(b)(6), 846; Fed.Rules Cr.Proc. Rule 14, 18 U.S.C.A.

27. Criminal Law ⇐622.2(8)

In prosecution for possession of marijuana with intent to distribute and conspiracy to possess marijuana with intent to distribute in which one group of defendants asserted defense contesting both elements of possession and intent and another group of defendants asserted defense contesting only element of content, any "spillover effect" on defendants contesting both elements caused by testimony presented by the other defendants concerning quantity and methods of marijuana consumption by religious group to which the defendants belonged was cured by trial court's instructions. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(b)(6), 406, 21 U.S.C.A. §§ 841(b)(6), 846; Fed. Rules Cr.Proc.Rule 14, 18 U.S.C.A.

28. Conspiracy ⇐47(12)
Drugs and Narcotics ⇐123

In prosecution for possession of marijuana with intent to distribute and conspiracy to possess marijuana with intent to distribute, evidence, including common association, giving of false names to arresting officers, attempted flight, finding of large amounts of marijuana in plain view, and lack of convincing alternative explanations, was sufficient to sustain convictions. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(b)(6), 406, 21 U.S.C.A. §§ 841(b)(6), 846.

29. Criminal Law ⇐868

Trial court adequately investigated possibility of jury taint where single juror who indicated slightest ground for concern was promptly excused, and where remaining jurors were regularly questioned as to whether they had been exposed to media reports inadvertently or otherwise.

James R. Cook, Des Moines, Iowa, with whom Cook & Waters Law Firm, and William Kutmus, Des Moines, Iowa, were on brief, for appellants.

James L. Sultan, Boston, Mass., by appointment of the Court, for Jacob Shnurman.

James D. Poliquin, Portland, Me., by appointment of the Court, and Norman & Hanson on brief, for Thomas G. Converse.

Irving F. Imoberstag on brief, pro se.

Carl Eric Olsen on brief, pro se.

Jeffrey Allen Brown on brief, pro se.

Margaret D. McGaughey, Asst. U.S. Atty., Portland, Me., with whom Richard S. Cohen, U.S. Atty., Portland, Me., and Jay P. McCloskey, Asst. U.S. Atty., Bangor, Me., were on brief, for appellee.

Before COFFIN and BOWNES, Circuit Judges, and PETTINE,* Senior District Judge.

BOWNES, Circuit Judge.

These appeals are taken by fifteen men convicted after a jury trial of one or both counts under a two-count indictment charging them with (a) conspiracy to possess marijuana with intent to distribute, 21 U.S.C. §§ 846 & 841(b)(6), and (b) possession of marijuana with intent to distribute, 21 U.S.C. §§ 841(a)(1) & 841(b)(6). Appellants' principal claims are that their speedy trial rights were violated, that some of them were denied the opportunity to raise

* Of the District of Rhode Island, sitting by designation.

the free exercise clause of the first amendment as a legally sufficient defense, and that motions for severance were improperly denied. We affirm the convictions.

I. BACKGROUND

The evidence may be summarized as follows. On May 20, 1980, an isolated piece of property in Stockton Springs, Maine, was purchased by appellant D. Nissenbaum under the alias Arkin. The so-called Arkin property included several buildings with storage facilities. Five days later, an isolated shorefront property on Deer Isle, Maine, equipped with a deepwater dock and four buildings, was purchased with a $100,000 down payment in the name of a Paula Leurs. Suspecting that the two properties might be used for illegal drug trafficking, law enforcement agents established surveillance of both properties in August, 1980.

On the evening of October 19, 1980, a pickup truck was observed leaving the Arkin property loaded with material; it arrived at the Leurs property around 9:30 p.m. Shortly after 9:00 p.m., a dozen people were observed on the Leurs property carrying large objects, later identified as Zodiac rubber boats, down to the dock. Just after midnight the JUBILEE, a large, oceangoing vessel, was observed approaching from the open sea. It followed the shoreline towards the Leurs property without navigational lights, dropped anchor and cut its engines approximately one-tenth of a mile from the Leurs dock. Over a three-hour period, three rubber boats holding two people each made numerous trips between the dock area and the JUBILEE, transporting bales of what was later identified as marijuana from the JUBILEE to shore. The bales, after having been brought ashore, were loaded into pickup trucks and transported further inland.

The unloading of the marijuana bales continued for roughly three hours. At 3:05 on the morning of October 20, federal and state law enforcement officers entered the Leurs property in police cars with blue lights flashing. As the officers emerged from the cars and approached the dock area on foot, the people gathered there began to run away into the woods. The officers fanned out in pursuit. Ten of the appellants were apprehended at the time of the raid in the shore area and in the woods nearby,[1] and two more were later found crouched in a hollow a short distance from the dock.[2] Approximately twenty tons of marijuana were seized.

When the raid began, the JUBILEE cut anchor and proceeded out to sea, pursued by a police patrol boat, a coast guard search-and-rescue boat, and then a coast guard cutter. The JUBILEE was finally intercepted and boarded after a protracted chase by the cutter, and the four-man crew, including two of the present appellants,[3] was arrested.

Twenty-three people were arrested in connection with the October 20 raid and named in the original indictment returned on October 29, 1980.[4] A twenty-fourth defendant, D. Nissenbaum, was added in a superseding indictment. By the time trial commenced in December, 1982, however, two defendants had become fugitives, another two had pleaded nolo contendere, and charges had been dismissed as to four others, leaving a total of sixteen defendants facing trial on the conspiracy and possession with intent charges.[5] Of these, five

1. D. Rush, L. Lancelotti, G. Lancelotti, Leaton, H. Shnurman, Risolvato, Cohen, Converse, Johnson and J. Shnurman.

2. Imoberstag and Olsen.

3. Collins and Brown.

4. Middleton, D. Rush, L. Lancelotti, G. Lancelotti, Leaton, H. Shnurman, Risolvato, Cohen, Converse, Johnson, Booth, Hanson, Imoberstag, Olsen, J. Shnurman, J. Tranmer, C. Nissenbaum, D. Woodward, B. Rush, O'Hara, Collins, Brown and Lawler.

5. D. Rush, L. Lancelotti, G. Lancelotti, Leaton, H. Shnurman, Risolvato, Cohen, Converse, Johnson, Hanson, Imoberstag, Olsen, J. Shnurman, Collins, Brown and D. Nissenbaum.

were convicted on both counts,[6] one on the first count only,[7] nine on the second count only,[8] and one was acquitted on both counts.[9]

II. SPEEDY TRIAL ACT

The Speedy Trial Act of 1974, as amended, 18 U.S.C. §§ 3161 *et seq.*, requires that trial commence within a specified time limit:

> In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

18 U.S.C. § 3161(c)(1). The same section, however, also provides that certain "periods of delay shall be excluded ... in computing the time within which the trial ... must commence." *Id.*, § 3161(h). In the absence of excludable delay under (h), the starting point for computing the seventy-day limit under (c) in this case would be October 30, 1980, the day after the original October 29 indictment.[10] *See* Fed.R. Crim.P. 45(a); Committee on the Administration of the Criminal Law, Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, as Amended* [hereinafter *Guidelines*] at 22–23; *United States v. Mers*, 701 F.2d 1321, 1332 n. 6 (11th Cir.), *cert. denied*, — U.S. —, 104 S.Ct. 482, 78 L.Ed.2d 679 (1983).

[1] Among the time exclusions for "other proceedings concerning the defendant" are periods of "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. § 3161(h)(1)(F). The exclusion for pretrial motions is automatic; a showing of actual delay is not required. *United States v. Novak*, 715 F.2d 810, 813 (3d Cir.1983), *cert. denied sub nom. Ware v. United States*, — U.S. —, 104 S.Ct. 1293, 79 L.Ed.2d 694 (1984); *United States v. Brim*, 630 F.2d 1307 (8th Cir.1980), *cert. denied*, 452 U.S. 966, 101 S.Ct. 3121, 69 L.Ed.2d 980 (1981). The length of time excludable under (h)(1)(F) is limited to "such delay as is reasonably necessary from the time of filing a pretrial motion to the time of conducting a hearing on it or completing submission of the matter to the court for decision." *United States v. Mitchell*, 723 F.2d 1040, 1047 (1st Cir.1983).

[2, 3] The defendants' first pretrial motion was a motion to preserve evidence, filed on November 7, 1980, by Booth and joined by other defendants. A hearing on that motion was held on November 25, 1980, and it was agreed at that time that no court action was required. The time from November 7 through November 25 was clearly excludable under (h)(1)(F), and the district court so found. The government, however, points out that a government pretrial motion for an "order permitting destruction of seized marijuana" had been filed on October 24, 1980, before the speedy trial clock was even set. A hearing on this motion was held on November 25, and it was granted in an order dated December 18. The government's motion thus overlapped the defendants', and we find that the time from October 30 until the

6. D. Rush, L. Lancelotti, Cohen, Collins and Brown.

7. D. Nissenbaum's motion for a judgment of acquittal at the conclusion of the evidence was granted with respect to the second count; his case went to the jury only on the conspiracy count.

8. G. Lancelotti, Leaton, H. Shnurman, Risolvato, Converse, Johnson, Imoberstag, Olsen and J. Shnurman.

9. Hanson.

10. All of the twenty-four defendants except for D. Nissenbaum were named in the original October 29 indictment.

filing of the defendants' motion on November 7 was excludable.[11]

[4] While the government's and the defendants' motions were still pending, defendants Booth and Middleton filed numerous additional pretrial motions in which other defendants joined, which independently gave rise to (h)(1)(F) exclusions. For purposes of speedy trial computations, the relevant motions are two suppression motions, both filed on November 21, 1980. The government filed an opposition on February 4, 1981, an evidentiary hearing was held on February 23–26, and oral argument took place on March 17, 1981. The record before us leaves no doubt that the time from November 21, 1980, through March 17, 1981, was "reasonably necessary" under the standard adopted in *Mitchell*, 723 F.2d at 1047. On the facts in this case, we must reject the argument to the contrary. *See United States v. Gonsalves*, 735 F.2d 638, 641 (1st Cir.1984); *United States v. Regilio*, 669 F.2d 1169, 1172 (7th Cir.1981), *cert. denied*, 457 U.S. 1133, 102 S.Ct. 2959, 73 L.Ed.2d 1350 (1982). We agree with the district court that this entire period was excludable under (h)(1)(F).

[5] The (h)(1)(F) exclusion applies not only to the particular defendants who file or join in pretrial motions, but also to codefendants whose trials have not been severed and whose speedy trial time has not otherwise run out. Section (h)(7) provides an exclusion for "[a] reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted." Every circuit court that has considered this provision has held in essence that "an exclusion applicable to one defendant applies to all codefendants." *United States v. Edwards*, 627 F.2d 460, 461 (D.C.Cir.), *cert. denied*, 449 U.S. 872, 101 S.Ct. 211, 66 L.Ed.2d 92 (1980); *see United States v. Tedesco*, 726 F.2d 1216, 1219 (7th Cir.1984); *United States v. Campbell*, 706 F.2d 1138, 1141 (11th Cir.1983); *United States v. Fogarty*, 692 F.2d 542, 546 (8th Cir.1982), *cert. denied*, 460 U.S. 1040, 103 S.Ct. 1434, 75 L.Ed.2d 792 (1983); *United States v. McGrath*, 613 F.2d 361, 366 (2d Cir.1979), *cert. denied sub nom. Buckle v. United States*, 446 U.S. 967, 100 S.Ct. 2946, 64 L.Ed.2d 827 (1980); *see also Novak*, 715 F.2d at 814 (qualified by "reasonableness limitation").

We note that the *Guidelines* adopt a different interpretation of (h)(7). Under the *Guidelines* approach, an (h)(7) exclusion would be available only when a particular defendant's seventy days had already run and additional time was necessary to permit a joint trial with an unsevered codefendant as to whom the seventy days had not yet run. *See Guidelines* at 52–53. The *Guidelines* approach represents a plausible application of the statutory text. It accurately allocates exclusions to defendants on an individual basis, thus minimizing the burden on individual defendants resulting from joint trials and affording each defendant the fullest possible benefit of the Speedy Trial Act. At the same time, however, the *Guidelines* approach considerably reduces the amount of excludable time in joint trials and puts pressure on trial courts to sever defendants or grant "ends of justice" continuances routinely as soon as a single defendant's seventy days expire, in order to avoid having even a single nonexcludable day elapse thereafter. Moreover, the *Guidelines* approach calls for individual speedy trial computations which could easily become unmanageable in a multidefendant case such as the present one. We cannot square such an interpretation with the congressional intent of avoiding waste of resources on unnecessary severances and separate trials. *See Novak*, 715 F.2d at 814–15; S.Rep. No. 93–1021, 93d Cong., 1st Sess. 38 (1974) and S.Rep. No. 96–212, 96th Cong., 1st Sess. 24–25, *reprinted in* A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974 135–36 (Fed.Judicial Center 1980). The *Guide-*

11. The (h)(1)(F) exclusion applies whether the pretrial motion is filed before or after indictment. *See* S.Rep. No. 93–1021, 93d Cong., 2d Sess. 32–33 (1974), *reprinted in* A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974 94 (Fed.Judicial Center 1980).

lines, of course, are not binding, and we find the reasons advanced by the Eleventh Circuit in *Campbell* compelling on this point. *See* 706 F.2d at 1141–43. Therefore, although we have not previously been directly confronted by the issue, *see United States v. Brown*, 736 F.2d 807, 809 (1st Cir.1984), we now join the Second, Third, Seventh, Eighth, Eleventh, and District of Columbia Circuits and hold that (h)(7) "stops the [speedy trial] clock for one defendant in the same manner and for the same amount of time as for all co-defendants." *Campbell*, 706 F.2d at 1141.

[6, 7] Because of the (h)(7) exclusion, the (h)(1)(F) exclusions for the overlapping pretrial motions applied to all twenty-four defendants.[12] Up to March 17, 1981, therefore, none of the seventy days had run on the speedy trial clock. On March 17, the same day on which the suppression motions were argued, the district court issued an order scheduling trial for May 18, 1981. At the same time, the court granted motions to sever the trials of the three female defendants (J. Tranmer, C. Nissenbaum and D. Woodward) and denied the severance motions of the remaining defendants "except as follows":

> (a) The trial of those defendants who will assert a "First Amendment" defense shall be severed from the trial of those defendants who will not be asserting a "First Amendment" defense;
>
> (b) Each defendant shall advise the Court and the United States Attorney by Wednesday, April 15, 1981, as to whether or not he will be asserting a "First Amendment" defense;
>
> (c) Counsel for those defendants who will be asserting a "First Amendment" defense shall file with the Court and serve upon the United States Attorney by Wednesday, April 15, a joint memorandum of law in support of said defense; the Government shall similarly file with the Court and serve upon defendants' counsel by Monday, May 4, its responsive memorandum;
>
> (d) The trial of those defendants who will not be asserting "First Amendment" defense shall commence on Monday, May 18, at 10:00 a.m. (estimated one to two weeks trial time);
>
> . . . .
>
> (e) *If upon the basis of counsel's written memoranda and any oral argument, the Court determines that the "First Amendment" defense is not viable, all defendants shall be prepared to proceed to trial on Monday, May 18*
>
> . . . .

(Emphasis in original.) Because (h)(7) carries exclusions applicable to one defendant over only to codefendants "as to whom . . . no motion for severance has been granted," our computation of speedy trial time for the period after March 17, 1981, depends on a correct determination of the effect of the March 17 order. The three female defendants whose trials were unconditionally severed are eliminated from our calculations at this point, for the charges against them were subsequently dropped and they are not involved in this appeal. As for the two groups of defendants—those "who will assert a 'First Amendment' defense," whom we shall call the "first amendment" defendants, and those "who will not be asserting a 'First Amendment' defense," or the "conventional" defendants—the severance was only conditional. The court expressly stated that all defendants would be tried together if the court ruled that the first amendment defense were not viable. As it happened, the court did eventually make just that ruling, on November 23, 1982, and ordered all of the remaining defendants tried jointly. Thus, although it was contemplated for a protracted period that the

12. This and subsequent exclusions apply to D. Nissenbaum on the same basis as to the other defendants. Although D. Nissenbaum was first named in the superseding indictment returned on February 4, 1981, the speedy trial computations with respect to him under the seventy-day time limit are the same as for the defendants named in the original indictment because no nonexcludable time had yet run as to the others before February 4. The superseding indictment, of course, made no difference in the speedy trial computations for the defendants named in the original indictment. *See Mitchell*, 723 F.2d at 1045; *Novak*, 715 F.2d at 817–18.

trial of the first amendment defendants would take place after that of the conventional defendants *in the event the first amendment defense were found valid*, the precondition for the severance never came about, nor did the severance contemplated in the March 17 order ever become effective.[13]

We do not think that the order can be viewed as providing some sort of temporarily operative severance for speedy trial purposes, because it is virtually impossible to ascertain the composition of the two groups referred to in the order. The record shows that as of July 17, 1981, twelve of the twenty-one defendants remaining at that time had advised the court that they would rely on a first amendment defense,[14] eight had advised that they would not,[15] and one remained undecided.[16] By August 11, 1981, three defendants had switched to the first amendment group.[17] By September 21, 1981, three more conventional defendants had switched to the first amendment group,[18] and one had abandoned that group to become undecided.[19] On October 7, 1982, only one or two remained in the conventional group, and only one remained on October 25.[20] To compute individual speedy trial time exclusions under (h)(7) in these circumstances would give gamesmanship priority over the practicalities of trial management. We do not construe the Speedy Trial Act to require anything of the sort. We hold that the March 17 order did not effectively sever the trials of the first amendment and conventional groups, and compute speedy trial time exclusions under (h)(7) with respect to proceedings after March 17, 1981, as if the severance motion had been denied at the outset.

13. The question whether the denial of severance was an abuse of discretion under Federal Rule of Criminal Procedure 14 is analytically distinct; it is discussed in Part IV.

14. D. Rush, H. Shnurman, Cohen, Johnson, Hanson, Imoberstag, J. Shnurman, Collins, Brown, Lawler, B. Rush and O'Hara.

15. Middleton, L. Lancelotti, G. Lancelotti, Leaton, Risolvato, Converse, D. Nissenbaum and Booth.

[8, 9] Between March 17, 1981, when the district court took the suppression motions under advisement, and June 24, 1981, when it issued a detailed memorandum and order denying the motions, well over thirty days elapsed. An automatic exclusion is provided in (h)(1)(J) for "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court." Unlike the pretrial motion exclusion in (h)(1)(F), the advisement exclusion in (h)(1)(J) is expressly limited to thirty days, and cannot be extended without resort to another source of excludable time such as an "ends of justice" continuance under (h)(8). *United States v. Cobb*, 697 F.2d 38, 43 (2d Cir. 1982); *see also Mitchell*, 723 F.2d at 1047 n. 6; *United States v. Janik*, 723 F.2d 537, 544 (7th Cir.1983). Of the ninety-eight days that elapsed between oral argument and ruling on the suppression motions, therefore, only thirty are excludable under (h)(1)(J), namely the period from March 18 through April 16, 1981.

[10] The government argues that an independent, overlapping exclusion arose under (h)(1)(F) on March 9, 1981, when H. Shnurman filed a memorandum and proffer with respect to the first amendment defense. We reject this argument because, in our view, an offer of proof is not a pretrial motion within the meaning of (h)(1)(F). Instead, it is a submission of evidence which need not be admitted or excluded until trial; indeed, it is commonly carried over until trial. If such submissions were held to be pretrial motions or "other proceedings concerning the defendant" triggering automat-

16. Olsen.

17. L. Lancelotti, Converse and Olsen.

18. Middleton, Risolvato and Booth.

19. Imoberstag.

20. Leaton.

ic exclusions under (h)(1), the Speedy Trial Act could easily be circumvented by filing offers of proof at an early stage and then failing to press for prompt disposition. This was not the intent of Congress under (h)(1)(F), *see Brown*, at 810; *Mitchell*, 723 F.2d at 1046, or (h)(1) generally. The district court did not exclude the proffered evidence until October 25, 1982, more than two and one-half years after the proffer was filed, and did so then only indirectly, in ruling on a government motion to limit the defense evidence. The district court did not treat the proffer as a pretrial motion for purposes of (h)(1)(F), and we see no reason to do so.

[11] When the thirty-day exclusion under (h)(1)(J) expired on April 16, 1981, the speedy trial clock finally began to run. After eleven nonexcludable days, it stopped once more because ten of the defendants [21] were being tried on similar charges in the United States District Court for the Southern District of Florida. Under (h)(1)(D), "delay resulting from trial with respect to other charges against the defendant" is automatically excludable. Appellants concede that the time from the commencement of the Florida trial on April 28 through its conclusion on June 19, 1981, was excludable.

The Florida trial disrupted the trial schedule in the present case, which had initially been set for May 18, 1981. The fallback date of June 1, 1981, was likewise precluded by the Florida trial. On June 4, 1981, stating that it had "been advised that the Florida trial has not concluded and that counsel would need additional time to prepare for trial" beyond the second fallback date of July 6, 1981, the district court entered the following order:

> IT IS ORDERED that, pursuant to Title 18 U.S.C., § 3161(h)(8), the ends of justice served by the further continuance of the trial would serve the ends of justice and outweigh the best interest of the public in the speedy trial. Accordingly, the trial in this action stands continued until further order of the Court and that the time from May 18, 1981 until the time of the commencement of this trial be excluded from computation under the Speedy Trial Act.

Under (h)(8), delay resulting from a continuance is excludable if the trial judge grants the continuance on the basis of findings set out in the record that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial.[22] Appel-

21. Middleton, L. Lancelotti, G. Lancelotti, Booth, Imoberstag, J. Shnurman, B. Rush, Collins, Brown and Lawler.

22. Section (h)(8) provides an exclusion for:

> (A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.
>
> (B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:
>
> (i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.
>
> (ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.
>
> ....
>
> (iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

lants challenge the validity of the June 4 order on three grounds: that retroactive continuances are not permissible; that the findings were inadequate; and that the speedy trial exclusion was improperly open-ended.

Other courts have held that (h)(8) continuances may not be given retroactive effect—that the order granting a continuance must be made at the outset of the excludable period. *Janik*, 723 F.2d at 545; *United States v. Brooks*, 697 F.2d 517, 522 (3d Cir.1982), *cert. denied sub nom. Reed v. United States*, 460 U.S. 1071, 103 S.Ct. 1526, 75 L.Ed.2d 949 (1983); *but see United States v. Cameron*, 510 F.Supp. 645, 649–50 (D.Md.1981). This court has not addressed the question, *United States v. Jodoin*, 672 F.2d 232, 237 (1st Cir.1982), and need not do so now. Appellants concede that the entire period from May 18 to June 4 is excludable under (h)(1)(D) without regard to (h)(8).

[12, 13] As to the adequacy of the district court's findings, we note that, although the reasons for an (h)(8) continuance must be "reasonably explicit," *United States v. Perez-Reveles*, 715 F.2d 1348, 1352 (9th Cir.1983) (conclusory statements insufficient), they need not be given at the time the continuance is granted. *United States v. Bryant*, 726 F.2d 510, 511 (9th Cir.1984); *Janik*, 723 F.2d at 544–45; *Brooks*, 697 F.2d at 522; *United States v. Clifford*, 664 F.2d 1090, 1095 (8th Cir.1981); *Edwards*, 627 F.2d at 461, *cited in Mitchell*, 723 F.2d at 1043–44. The purpose of the requirement that reasons be stated is to insure careful consideration of the relevant factors by the trial court and to provide a reviewable record on appeal. Both purposes are served if the text of the order, taken together with more detailed subsequent statements, adequately explains the factual basis for the continuance under the relevant criteria. *Brooks*, 697 F.2d at 520–22. Indeed, although the trial court may not merely incorporate reasons by reference, *Janik*, 723 F.2d at 545, it is not necessary for the court to articulate the basic facts where they are obvious and set forth in a motion for a continuance. *Mitchell*, 723 F.2d at 1044 (motion and court ruling read as complementary documents). In the present case, the court mentioned the Florida trial and counsel's expressed need for additional preparation time as reasons for granting an "ends of justice" continuance; these are in themselves sufficient grounds under (h)(8)(B)(i) & (iv). Moreover, reviewing the protracted history of the case during the November 23, 1982 hearing on defendants' speedy trial motion to dismiss, the court elaborated on the basis of its June 4, 1981 order.

> That order was entered, as the record will reflect, by agreement, indeed at the request of defense counsel, because of the Florida trial and other complications, and no defense counsel has even remotely suggested that they wished a Court order setting a trial date.

The court also attributed any unnecessary delay to the defendants:

> Whatever delays have resulted in this case have been entirely ... the result of dilatory tactics and various appeals and motions, and so forth, filed by the defendants, and indeed counsel have on numerous occasions when the Court has raised the problem of speedy trial time running, counsel ... have expressly consented, agreed, and requested continuances.

[14, 15] The district court's findings leave us with no doubt that the June 4 continuance was properly grounded in relevant criteria under (h)(8)(B). The trial could not have gone forward without the continuance, and the delay was requested by defense counsel to enable them to prepare following the Florida trial. Moreover, we think that on its face the record shows that this case was sufficiently complex to justify a continuance under (h)(8)(B)(ii) because of the number of defendants, the

(C) No continuance under paragraph (8)(A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

plethora of motions, the potentially intricate questions raised by the first amendment defense, and the procedural tangle resulting from various defendants' changes in position. *Cf. United States v. Guerrero*, 667 F.2d 862, 866 (10th Cir.), *cert. denied*, 456 U.S. 964, 102 S.Ct. 2044, 72 L.Ed.2d 490 (1982) (court need not articulate self-evident facts supporting (h)(8)(A) continuance). We also note in passing that, although defendants do not bear the primary responsibility for alerting the court to speedy trial deadlines, this does not mean that they may deliberately obtain an (h)(8) continuance for their own convenience in the face of speedy trial concerns articulated by the trial court and then later claim that the court abused its discretion in granting the requested continuance. *See Jodoin*, 672 F.2d at 238; *cf. United States v. Bufalino*, 683 F.2d 639, 646 (2d Cir. 1982), *cert. denied*, 459 U.S. 1104, 103 S.Ct. 727, 74 L.Ed.2d 952 (1983) (defendant may not claim Speedy Trial Act violation caused by own failure to respond to government motion).

[16, 17] Appellants' third objection to the June 4 continuance is not frivolous. They argue that the district court should have set a specific ending date for the continuance. *See United States v. Pollock*, 726 F.2d 1456, 1461 (9th Cir.1984) ((h)(8) continuance "proper only if ordered for a specific period of time"). Doubtless it is generally preferable to limit a continuance to a definite period for the sake of clarity and certainty; but at the same time it is inevitable that in some cases, like the present one, a court is forced to order an (h)(8) continuance without knowing exactly how long the reasons supporting the continuance will remain valid.[23] In this case, an alternative trial date of July 6, 1981, was rejected by defense counsel on June 4, 1981, because it was anticipated that additional preparation time would be necessary after the conclusion of the Florida trial, *at whatever time that might occur.* The purpose of (h)(8) continuance is to make the Speedy Trial Act "flexible enough to accommodate the practicalities of our adversary system." *Mitchell*, 723 F.2d at 1044. We do not think a rule barring open-ended continuances altogether serves this purpose. Moreover, *Pollock* appears to be the first and, so far, only case to adopt such a rule; it was decided nearly three years after the continuance was granted in this case, and we decline to apply it here. It may well be that some sort of reasonableness limitation is appropriate to prevent continuances from delaying trials unfairly and circumventing the dismissal sanctions in the Speedy Trial Act; but we need not decide at what point, if any, such a limitation might have been exceeded in this case, for even if the June 4 continuance is construed to last for only thirty days from the end of the Florida trial, *i.e.*, through July 19, 1981 (two weeks from the alternative July 6 trial date rejected by defendants), there is no Speedy Trial Act violation.

[18, 19] On July 14, 1981, Booth and Middleton filed motions to dismiss on double jeopardy grounds, claiming that their convictions in the Florida proceedings barred further prosecution in this case. A hearing was scheduled for August 11, 1981, but on that date both defendants filed amendments to their motions; accordingly, the hearing was postponed until September 11. Three days later, on September 14, 1981, the district court ruled on both motions, denying Booth's (in which the eight other defendants convicted in the Florida trial had joined) and granting Middleton's. Appeals were taken by the nine defendants whose motion was denied and by the government respectively on September 17 and 22, 1981. The time from the filing of the motions on July 14 through the September 11 hearing and September 14 rulings was excludable with respect to all twenty-

23. This appears to be the concern underlying section 6(d)(3) of the Speedy Trial Plan adopted by the District of Maine, which provides:

> The court may grant a continuance under 18 U.S.C. § 3161(h)(8) for either a specific period of time or a period to be determined by reference to an event (such as recovery from illness) not within the control of the government....

one defendants (aside from the three severed female defendants) under (h)(1)(F) & (J) and (h)(7). An independent exclusion then took effect under (h)(1)(E), which automatically excludes "delay resulting from any interlocutory appeal," on the date the defendants filed their appeal. *United States v. McGrath*, 622 F.2d 36, 40 (2d Cir.1980). We announced our decisions affirming both orders in companion cases on March 19, 1982. *United States v. Booth*, 673 F.2d 27 (1st Cir.), *cert. denied*, 456 U.S. 978, 102 S.Ct. 2245, 72 L.Ed.2d 853 (1982); *United States v. Middleton*, 673 F.2d 31 (1st Cir.), *reh'g denied* (1st Cir. Aug. 10, 1982).

Courts which have considered the question of when an appeal ends and the clock begins to run again for speedy trial purposes have generally held that the applicable date is the date on which the appellate court issues its mandate. *United States v. Mack*, 669 F.2d 28, 33 (1st Cir.1982); *United States v. Ross*, 654 F.2d 612, 616 (9th Cir.1981), *cert. denied*, 455 U.S. 926, 102 S.Ct. 1290, 71 L.Ed.2d 470 (1982); *United States v. Cook*, 592 F.2d 877, 880 (5th Cir.), *cert. denied*, 442 U.S. 921, 99 S.Ct. 2847, 61 L.Ed.2d 289 (1979); *cf. United States v. Gilliss*, 645 F.2d 1269, 1276 (8th Cir.1981) (noting *Guidelines* use of date district court receives appellate court's mandate). Although these cases relate to subsection (e) (time limits for retrial following appeal) rather than to (h)(1)(E), we see no reason to apply a different ending date to interlocutory appeals under the latter section. In both situations it is the date on which the mandate is issued which determines when the district court reacquires jurisdiction for further proceedings. *See Ross*, 654 F.2d at 616. Moreover, where various charges being tried together are appealed separately and the records with respect to both appeals are retained at the defendant's request as a single unit to facilitate review, the speedy trial clock does not begin to run again in the district court until final disposition of both charges. *See United States v. Lyon*, 588 F.2d 581, 582 (8th Cir.1978), *cert. denied*, 441 U.S. 910, 99 S.Ct. 2005, 60 L.Ed.2d 381 (1979).

[20] In this case, the records in *Booth* and *Middleton* were kept together in this court until the latter appeal was finally decided. Although this was not at the defendants' express request, it was, at least, with their implied consent. No inquiries, let alone requests, as to the record in *Booth* were made between the time our mandate issued in that case on April 9, 1981, and the issuance of our mandate in *Middleton* on August 17, 1982. We need not address any speedy trial claims which might be raised if *Middleton* had not been pending before this court during that interval, however, because *Middleton* by itself was sufficient to stop the speedy trial clock with respect to all defendants through August 17 under (h)(1)(E) and (h)(7). Until that date, Middleton did not cease to be "a codefendant as to whom the time for trial ha[d] not yet run and no motion for severance ha[d] been granted."

From August 18 through September 20, 1982, we assume, without deciding, that no speedy trial exclusion was in effect and that these thirty-four days ran on the seventy-day clock. On September 21, 1982, a pretrial conference was held "at which an effort was made by the [district court] to set down trials of the two different groups of defendants which kept moving around back and forth and back and forth .... At that time it was agreed by all counsel ... that the speedy trial clock would stop and [speedy trial claims] would not be asserted." Appellants concede that this statement by the district court reflects an accurate account of the September 21 waiver, and they do not dispute that the time from September 21, 1982, until the impanelling of the jury on December 7, 1982, was excludable.[24] *See Guidelines* at 9. We find

24. Leaton apparently withdrew his waiver of speedy trial claims as of October 25, 1982. By that time, however, the government's October 12 motion concerning the first amendment defense was pending. The government's motion, along with H. Shnurman's November 2 speedy trial motion, was finally decided on November 23, 1982. An appeal from the latter ruling was filed

that a total of, at most, forty-seven nonexcludable days elapsed between indictment and trial: eleven days from April 17 through April 27, 1981; possibly two days between the September 14, 1981 order and the interlocutory appeal on September 17; and possibly thirty-four days between the issuance of the mandate in *Middleton* on August 17, 1982, and the speedy trial waiver in open court on September 21. Thus, we conclude that the seventy-day limit was not exceeded.

[21] A separate Speedy Trial Act violation is asserted by Converse, Imoberstag, H. Shnurman and J. Shnurman, who argue —paradoxically, it might be thought—that trial took place too soon after their arraignment, depriving them of adequate preparation time. They cite section 3161(c)(2) of the Act, which provides:

> Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

The record shows that all four appellants were arraigned on the superseding indictment on December 6, 1982, the day before trial. The record also shows, however, that at the time the superseding indictment was returned the original indictment, identical in all respects except for the addition of D. Nissenbaum as a defendant, was still outstanding, and that all four appellants had been arraigned on the original indictment on October 29 and November 7, 1980. The issue before us, therefore, is whether (c)(2) applies to the superseding indictment at all. We think not.

The Speedy Trial Plan adopted by the District of Maine provides that the thirty-day minimum time limit begins to run at the same time as the seventy-day maximum limit when a superseding indictment is returned before the original indictment is dismissed.[25] This rule, which avoids conflicting time requirements under (c)(1) and (c)(2), has been adopted by the Seventh Circuit, at least for the situation where the charges in the original and superseding indictments are identical and there is no time gap between the two indictments. *United States v. Horton*, 676 F.2d 1165, 1170 (7th Cir.1982), *cert. denied*, 459 U.S. 1201, 103 S.Ct. 1184, 75 L.Ed.2d 431 (1983); *accord*, *Guidelines* at 14. The Ninth Circuit, on the other hand, has held that the Speedy Trial Act requires that the thirty-day time limit begin to run again when a defendant is reindicted, regardless whether the original indictment has been dismissed by the time the superseding indictment is returned, at least where the superseding indictment necessitates a change in defense strategy. *United States v. Harris*, 724 F.2d 1452, 1454–55 (9th Cir.1984); *cf. United States v. Arkus*, 675 F.2d 245, 248 (9th Cir.1982) (district court Speedy Trial Plan to the contrary notwithstanding, statute re-

on November 30. In no event can Leaton allege sufficient nonexcludable time between October 25 and trial to show a Speedy Trial Act violation.

25. Under section 4(d) of the Speedy Trial Plan, a superseding indictment such as the one in this case does not trigger a new seventy-day time limit:

> *Superseding Charges.* If, after an indictment or information has been filed, a complaint, indictment, or information is filed which charges the defendant with the same offense ..., the time limit applicable to the subsequent charge will be determined as follows:
>
> ....
>
> (2) If the original indictment or information is pending at the time the subsequent charge is filed, the trial shall commence within the time limit for commencement of trial on the original indictment or information.

Section 7 of the Plan provides:

> *Minimum Period for Defense Preparation.* Unless the defendant consents in writing to the contrary, the trial shall not commence earlier than 30 days from the date on which the indictment or information is filed, or, if later, from the date on which counsel first enters an appearance or on which the defendant expressly waives counsel and elects to proceed pro se. In circumstances in which the 70-day time limit for commencing trial on a charge in an indictment or information is determined by reference to an earlier indictment or information pursuant to section 4(d), the 30-day minimum shall also be determined by reference to the earlier indictment or information....

quires that new thirty-day period apply where original indictment dismissed before superseding indictment returned). Both views reflect the underlying congressional purpose of insuring that defendants be afforded reasonable trial preparation time. *Harris*, 724 F.2d at 1455, *citing United States v. Daly*, 716 F.2d 1499, 1504–05 (9th Cir.1983), *cert. dismissed*, — U.S. ——, 104 S.Ct. 1456, 79 L.Ed.2d 773 (1984); *Horton*, 676 F.2d at 1170. The statute does not explicitly provide for a new thirty-day period when the indictments overlap. Section 3161(d)(1) makes both the seventy-day and thirty-day time limits in (c) applicable if a superseding indictment is returned *after* the original indictment is dismissed *on the defendant's motion*,[26] and subsection (h)(6) provides an exclusion for any time gap between the two indictments.[27] The case before us, however, is not governed by (d)(1) or (h)(6). We think it fully consistent with the congressional purpose of (c)(2) to apply the thirty-day limit on the same basis as the seventy-day limit in (c)(1), unless in a specific case this would deprive a defendant of adequate opportunity to prepare his defense. On the facts of the present case, we conclude without hesitation that all four appellants had ample time for preparation. Indeed, the district court offered them a one-week continuance on December 6, 1982, which the court thought sufficient to cure any possible prejudice flowing from the last-minute arraignments and changes of counsel. The court's proposal was rejected. We note in addition that the appellants appear to be entirely responsible for the delay in their arraignment, which was granted at their request solely in order to save the effort and expense of superfluous pretrial appearances by counsel. Similarly, the potential conflicts which made changes of counsel necessary were apparent long before trial, and the district court acted well within its discretion in denying a longer continuance.[28] All defendants, therefore, having been promptly arraigned on the original indictment in 1980, were properly tried in December, 1982, and (c)(2) was not violated with respect to any of them.

III. FREE EXERCISE CLAUSE AND EQUAL PROTECTION

Appellants claim that they were denied the opportunity to assert a valid, legally sufficient defense based on the free exercise clause of the first amendment.[29] For purposes of this case the government stipulated to the following facts, which we assume, without deciding, are true:

26. If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

18 U.S.C. § 3161(d)(1).

27. Section (h)(6) provides the following exclusion:

> If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

28. We find no merit in J. Shnurman's contention that the denial of a thirty-day continuance, quite aside from Speedy Trial Act requirements, violated his sixth amendment right to effective assistance of counsel. Not only was this appellant responsible for delaying his arraignment and foreseeable change of counsel until the last minute, but, through counsel, he rejected the seven-day continuance proposed by the district court as a reasonable accommodation. He neither explains why the seven-day continuance would have been insufficient nor suggests how a thirty-day continuance would have met his needs. The record, moreover, reveals a thoroughly competent and active performance by his court-appointed attorney.

29. "Congress shall make no law ... prohibiting the free exercise [of religion] ...." U.S. Const. amend. I.

1) that the Ethiopian Zion Coptic Church is a religion embracing beliefs which are protected by the First Amendment; 2) that the use of marijuana is an integral part of the religious practice of the Church; and 3) that [all of the defendants] are members of the Church and sincerely embrace the beliefs of the Church.

On November 23, 1982, the district court ruled as a matter of law that the first amendment did not protect the possession of marijuana with intent to distribute by the defendants, and further ordered that the defendants be precluded from introducing at trial any evidence concerning the Ethiopian Zion Coptic Church and the use of marijuana by its members, insofar as such evidence related to their alleged first amendment defense.[30]

[22, 23] It is well established that the absolute constitutional protection afforded freedom of religious belief does not extend without qualification to religious conduct. *Braunfeld v. Brown*, 366 U.S. 599, 603, 81 S.Ct. 1144, 1145, 6 L.Ed.2d 563 (1961); *Cantwell v. Connecticut*, 310 U.S. 296, 303–04, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940). When a law is challenged as interfering with religious conduct, the constitutional inquiry involves three questions: (a) whether the challenged law interferes with free exercise of a religion; (b) whether the challenged law is essential to accomplish an overriding governmental objective; and (c) whether accommodating the religious practice would unduly interfere with fulfillment of the governmental interest. *See United States v. Lee*, 455 U.S. 252, 256–59, 102 S.Ct. 1051, 1054–56, 71 L.Ed.2d 127 (1982).

[24] In light of the government's stipulations, the first limb of the *Lee* standard is clearly met; there is no question that marijuana use is an integral part of the religious doctrine and practice of the Ethiopian Zion Coptic Church, and that appellants are sincere practicing members of that Church. The conflict with the criminal sanctions against possession of marijuana with intent to distribute is self-evident.

The question whether the government has an overriding interest in controlling the use and distribution of marijuana by private citizens is a topic of continuing political controversy. Much evidence has been adduced from which it might rationally be inferred that marijuana constitutes a health hazard and a threat to social welfare; on the other hand, proponents of free marijuana use have attempted to demonstrate that it is quite harmless. *See Randall v. Wyrick*, 441 F.Supp. 312, 315–16 (W.D.Mo.1977); *United States v. Kuch*, 288 F.Supp. 439, 446 & 448 (D.D.C.1968). In enacting substantial criminal penalties for possession with intent to distribute, Congress has weighed the evidence and reached a conclusion which it is not this court's task to review *de novo*. Every federal court that has considered the matter, so far as we are aware, has accepted the congressional determination that marijuana in fact poses a real threat to individual health and social welfare, and has upheld the criminal sanctions for possession and distribution of marijuana even where such sanctions infringe on the free exercise of religion. *United States v. Middleton*, 690 F.2d 820, 825 (11th Cir.1982), *cert. denied*, 460 U.S. 1051, 103 S.Ct. 1497, 75 L.Ed.2d 929 (1983); *United States v. Spears*, 443 F.2d 895 (5th Cir.1971), *cert. denied*, 404 U.S. 1020, 92 S.Ct. 693, 30 L.Ed.2d 669 (1972); *Leary v. United States*, 383 F.2d 851, 859–61 (5th Cir.1967), *rev'd on other grounds*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969); *Randall*, 441 F.Supp. at 316 & n. 2; *Kuch*, 288 F.Supp. at 448. Only last year, the Eleventh Circuit rejected identical claims raised by some of the very appellants before us in this case, *see Middleton*, 690 F.2d 820, and the United States Supreme Court denied review. We decline to second-guess the unanimous

30. The ruling was carefully tailored to exclude evidence only in relation to the first amendment defense; at trial, two defense witnesses were permitted to testify as to the quantity and methods of marijuana consumption by Church members in support of the *Swiderski* defense discussed in part IV.

precedent establishing an overriding governmental interest in regulating marijuana.

Finally, it has been recognized since *Leary* that accommodation of religious freedom is practically impossible with respect to the marijuana laws:

> Congress has demonstrated beyond doubt that it believes marihuana is an evil in American society and a serious threat to its people. It would be difficult to imagine the harm which would result if the criminal statutes against marihuana were nullified as to those who claim the right to possess and traffic in this drug for religious purposes. For all practical purposes the anti-marihuana laws would be meaningless, and enforcement impossible.

Leary, 383 F.2d at 861, *quoted in Middleton*, 690 F.2d at 825; *see also Kuch*, 288 F.Supp. at 447. Although a narrow administrative exception has been carved out from the Schedule I classification of peyote for the benefit of the Native American Church, *see* 21 C.F.R. § 1307.31, we think this exemption is properly viewed as a government "effort toward accommodation" for a "readily identifiable," "narrow category" which has minimal impact on the enforcement of the laws in question. *Lee*, 455 U.S. at 260 n. 11 & 261, 102 S.Ct. at 1057 n. 11. No broad religious exemption from the marijuana laws is constitutionally required. We therefore affirm the district court's ruling rejecting appellants' first amendment defense as a matter of law.

[25] We reject as well appellants' claim that members of the Ethiopian Zion Coptic Church are entitled as a matter of equal protection to a religious exemption from the marijuana laws on the same terms as the peyote exemption granted the Native American Church. Marijuana is not covered by the peyote exemption; this in itself distinguishes this case from *Kennedy v. Bureau of Narcotics and Dangerous Drugs*, 459 F.2d 415 (9th Cir.1972), *cert. denied*, 409 U.S. 1115, 93 S.Ct. 901, 34 L.Ed.2d 699 (1973). Moreover, the peyote exemption is uniquely supported by the legislative history and congressional findings underlying the American Indian Religious Freedom Act, which declares a federal policy of "protect[ing] and preserv[ing] for American Indians their inherent right of freedom to believe, express and exercise the[ir] traditional religions ..., including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." 42 U.S.C. § 1996. The legislative history of the Act "is clear in finding that religion is an integral part of Indian culture and that the use of such items as peyote are necessary to the survival of Indian religion and culture." *Peyote Way Church of God, Inc. v. Smith*, 556 F.Supp. 632, 637 (N.D.Tex.1983). In light of the *sui generis* legal status of American Indians, *see Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16–17, 8 L.Ed. 25 (1831) (Marshall, C.J.), and the express policy of the American Indian Religious Freedom Act (which was passed after *Kennedy* was decided), we think the Ethiopian Zion Coptic Church cannot be deemed similarly situated to the Native American Church for equal protection purposes.

IV. SEVERANCE

[26] At trial, the sixteen defendants aligned themselves in two groups asserting different defense theories. One group, known as the "conventional" defendants,[31] decided to put the government to its proof, alleging that there was insufficient evidence to convict them of conspiracy or possession with intent to distribute. The other group, known as the "*Swiderski*" defendants,[32] contended that they could be convicted of no crime more serious than simple possession because, they alleged, they had acquired joint and simultaneous possession of the marijuana and intended to share it only among themselves rather than distrib-

31. The conventional group comprised D. Rush, G. Lancelotti, Leaton, Risolvato, Converse, Johnson, Hanson and D. Nissenbaum.

32. The *Swiderski* group comprised L. Lancelotti, H. Shnurman, Cohen, Imoberstag, Olsen, J. Shnurman, Collins and Brown.

ute it to third persons. *See United States v. Swiderski*, 548 F.2d 445, 450–51 (2d Cir. 1977). Numerous motions were made for separate trials of the two groups under the applicable federal rule [33]; the district court, however, found that the positions of the two groups were "not so irreconcilable or so antagonistic as to require a severance" and that severance was not "justified."

> A motion for severance is addressed to the discretion of the trial court, and to prevail defendant must make a strong showing of prejudice.... We review a trial court's denial of a severance motion for abuse of discretion and reverse only if denial deprived defendant of a fair trial, resulting in a miscarriage of justice.

United States v. Arruda, 715 F.2d 671, 679 (1st Cir.1983) (citations omitted).

At the outset, we express considerable skepticism concerning the applicability of a *Swiderski* defense to the facts of this case. Although the *Swiderski* court held that "[w]here two individuals simultaneously and jointly acquire possession of a drug for their own use, intending only to share it together, their only crime is personal drug abuse—simple joint possession, without any intent to distribute the drug further," 548 F.2d at 450, the court also made it unmistakably clear that its holding was "limited to the passing of a drug between joint possessors who simultaneously acquired possession at the outset for their own use." *Id.* at 450–51. The *Swiderski* holding appears fully justified on the facts of that case, but we hesitate to approve its casual extension to situations where more than a couple of defendants and a small quantity of drugs are involved, for, as the *Swiderski* court pointed out,

> joint possession of a drug does not preclude a finding of possession with intent to distribute to a third person in violation of § 841(a). Whether such an inference may be drawn depends upon the surrounding circumstances, including the nature of the relationship (whether it is commercial rather than personal), the quantity of the drug (whether it is too large for personal use only), the number of people involved, and statements or conduct on the part of the defendants.

Id. at 450; *see United States v. Taylor*, 683 F.2d 18, 21 (1st Cir.), *cert. denied*, 459 U.S. 945, 103 S.Ct. 261, 74 L.Ed.2d 203 (1982) (*Swiderski* inapplicable to complex operation, a large quantity of marijuana); *United States v. Wright*, 593 F.2d 105, 108 (9th Cir.1979) (*Swiderski* not applicable where drug not simultaneously and jointly acquired). In the unusual circumstances of the present case, the district court left to the jury the factual question whether appellants' religious practices could account for their possession of almost one ton of marijuana per defendant and thus negate an inference of intent to distribute to third persons. This may have been an overabundance of caution on the court's part, but it does not affect our analysis of the severance issue. The *Swiderski* defendants were entitled to pursue whatever factual defense they could support, however implausible it might seem to a finder of fact; in this case, they may have had no colorable alternative.

In denying the severance motions, the district court relied on our decision in *United States v. Talavera*, 668 F.2d 625 (1st Cir.), *cert. denied sub nom. Pena v. United States*, 456 U.S. 978, 102 S.Ct. 2245, 72 L.Ed.2d 853 (1982). In *Talavera*, we stated:

> Severance is required only where the conflict is so prejudicial and the defenses are so irreconcilable that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.

Id. at 630. Applying this standard, the district court reasoned:

> The jury in this case could find both groups of defendants guilty or not guilty

33. Fed.R.Crim.P. 14 provides, in relevant part:
> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

> without making any logical error. Just, for example, it is clear in the view of this Court that the finding by the jury that the [*Swiderski* defendants] possessed marijuana without intending to distribute it beyond themselves or other individuals also on or in the vicinity of the Leurs property, in no way would compel a finding that any other defendant was on the Leurs property or near the Leurs property at that time or that any other defendant also possessed marijuana, either actively or constructively, or that any other defendant intended to distribute it in any way.

We find this reasoning persuasive, and conclude that *Talavera* is controlling in this case. As in *Talavera*, one defense to the charge of possession with intent to distribute contests both elements of possession and intent, while the other contests only the element of intent. The defenses would become irreconcilable only if the conventional defendants were allowed to allege as part of their defense that the *Swiderski* defendants intended to distribute the marijuana. *Talavera*, 668 F.2d at 630. This was not done.

[27] A related contention concerning the denial of severance is that the testimony presented by the *Swiderski* defendants concerning the quantity and methods of marijuana consumption by Ethiopian Zion Coptic Church members had a prejudicial "spillover effect" on the conventional defendants.[34] *See Arruda*, 715 F.2d at 679. We note, however, that the district court repeatedly instructed the jury during the trial and in the final charge to "consider the evidence as to each count separately and separately with respect to each defendant." The court also specifically cautioned the jury that mere association with a group of defendants who might be members of the same church was not sufficient evidence to establish the existence of a conspiracy. These instructions were properly given to cure any potential spillover effect. The jury must have heeded the instructions, for its verdicts were clearly not reached on an arbitrary or undifferentiated basis. Of the eight conventional defendants, five were acquitted on count one and convicted on count two, one was convicted on both counts, one was convicted on the first count only, and one was acquitted on both counts; of the eight *Swiderski* defendants, four were convicted on both counts and four on the second count only. We find that appellants failed to meet their heavy burden of showing that the denial of severance motions made their trial unfair.

V. CONCLUSION

[28] Appellants' other sundry contentions lack merit.[35] There was sufficient evidence to convict each of the appellants found on or about the Leurs property on October 20, 1980. The convictions cannot have been based on mere presence, but reflect the surrounding circumstances as well: there was a common association, false names were given to the arresting officers, flight was attempted, large amounts of marijuana were found nearby in plain view, and convincing alternative explanations were lacking. This is a far cry from the situation in *United States v. Francomano*, 554 F.2d 483 (1st Cir.1977), where the defendants had no prior association, the amounts of marijuana were small and readily concealed, and their presence aboard ship was apparently unrelated to the contraband cargo.

34. Although Thomas Reilly, a witness called by the *Swiderski* group to testify as to marijuana consumption within the Ethiopian Zion Coptic Church, stated that he "recognized" all of the defendants as fellow adherents of the Church, his testimony concerning specific individuals concerned only members of the *Swiderski* group. Reilly did not—indeed, he could not—testify as to the presence of any conventional defendant on the Leurs property on October 20, 1980, or any defendant's possession of marijuana or intent to distribute it to third persons at that time.

35. Appellants' motions for a judgment of acquittal or a new trial were denied from the bench by the district court on February 18, 1983. Appellant J. Shnurman is correct in attributing the court clerk's handwritten notation "granted" on two of those motions to clerical error.

[29] Finally, it is clear that the district court adequately investigated the possibility of jury taint. The single juror who indicated the slightest ground for concern was promptly excused, and the remaining jurors were regularly questioned as to whether they had been exposed to media reports inadvertently or otherwise. Although one defense attorney apparently contravened a court order in attempting to ferret out rumors of additional jury taint, the rumors he brought to the court's attention were never substantiated by affidavit or presented in a post-trial motion as the court suggested. We see no basis for challenging the convictions on this ground.

We conclude, therefore, that appellants have failed to prove reversible error or prejudicial unfairness in the conduct of the trial.

The convictions are affirmed.

ORDER OF COURT

ON PETITION FOR REHEARING FILED BY ATTORNEY COOK

The petition for rehearing filed by James Cook on behalf of appellants is denied. Appellants seek to equate the panel decision affirming dismissal in *United States v. Middleton*, 673 F.2d 31 (1st Cir.1982), with a severance of Middleton from the other defendants without regard to the pendency of a timely motion for rehearing. As we held at pages 23–24 of our slip opinion in the present case, the dismissal as to Middleton became operative as the equivalent of a severance for purposes of the Speedy Trial Act only when we issued our mandate on August 17 after considering and denying the government's petition for rehearing. Although, as appellants recognize, the district court could have entered an "ends of justice" continuance under (h)(8) as to the other defendants while the motion for rehearing in *Middleotn* remained pending, we think this would have been superfluous, for the exclusion under (h)(1)(E) was automatic. Furthermore, unlike (h)(1)(J), (h)(1)(E) does not provide for an exclusion automatically limited to 30 days; the holding in *Unted States v. Black*, 733 F.2d 349 (4th Cir.1984), concerning an (h)(1)(J) exclusion for an *untimely* petition for rehearing in banc filed after the issuance of the appellate court's mandate, is not in point. We have already considered and rejected J. Shnurman's contention that the denial of a thirty-day continuance following his arraignment on the superseding indictment violated his rights under the Speedy Trial Act or the sixth amendment. Slip op. at 25–29 & n. 28.

ORDER OF COURT

ON PETITION FOR REHEARING FILED BY CARL ERIC OLSEN

Upon consideration of the petition for rehearing filed by Carl Eric Olsen,

It is ordered that said petition be and the same hereby is denied.

ORDER OF COURT

ON PETITION FOR REHEARING FILED BY JACOB SHNURMAN

The petition for rehearing is denied. Petitioner Jacob Shnurman claims that he was denied the opportunity to present a "factual defense" to the jury based on the theory that "the seized marijuana was jointly possessed by the membership of the Zion Coptic Church." The district court properly ruled that on the facts of this case there was no basis in law or fact for such a defense because the only people who could have acquired joint and simultaneous possession, *see United States v. Swiderski*, 548 F.2d 445, 450–51 (2d Cir.1977), were those present when the marijuana was unloaded. For reasons fully set forth in our slip opinion, the first amendment does not supersede the criminal sanctions against possession of marijuana with intent to distribute. Petitioner's argument lacks merit.

Petitioner also disagrees with our reasoning distinguishing his situation from that of members of the Native American Church who enjoy an administrative exemption for their religious use of peyote. Our reasoning is fully set out in our slip

opinion, and we see no reason to supplement it or reconsider it.

ORDER OF COURT

ON PETITION FOR REHEARING FILED BY THOMAS G. CONVERSE

The petition for rehearing filed by James Poliquin on behalf of appellant Thomas Converse is denied. Neither the conventional defendants nor the *Swiderski* defendants alleged as part of their defense that the other group (or any individual defendant) intended to distribute the marijuana. Under our controlling holding in *United States v. Talavera*, 668 F.2d 625 (1st Cir.), *cert. denied sub nom. Pena v. United States*, 456 U.S. 978, 102 S.Ct. 2245, 72 L.Ed.2d 853 (1982), which we have already declined to reconsider, the district court had discretion to deny the motions for severance.

Justin GOMES, Plaintiff, Appellee,

v.

Michael V. FAIR, et al., Defendants, Appellants.

No. 83-1296.

United States Court of Appeals, First Circuit.

Argued Oct. 6, 1983.

Decided June 27, 1984.

Prison inmate brought § 1983 action against prison officials arising out of disciplinary report filed against inmate for handing sexually explicit poems to female member of prison staff. The United States District Court for the District of Massachusetts, Rya W. Zobel, J., permanently enjoined prison officials from conducting disciplinary hearing, and from taking other measures, and officials appealed. The Court of Appeals, Levin H. Campbell, Chief Judge, held that: (1) appeal was not moot; (2) issue for district court was limited to whether prison officials were acting in a good-faith and reasonable belief that restrictions they were imposing were necessary; (3) district court erred in finding that officials could not reasonably have believed that inmate's conduct warranted his reclassification and holding of disciplinary hearing; and (4) district court erred in enjoining holding of hearing on disciplinary report, had the inmate not prevailed at the hearing that court proceedings had been instituted and would themselves have gone forward notwithstanding.

Injunction vacated.

1. Federal Courts ⇐724

Appeal from order enjoining prison officials from conducting disciplinary hearing and taking other measures following incident in which inmate handed sexually explicit poems to female prison staff member was not moot, notwithstanding that at time of trial, inmate's allegedly retaliatory classification to maximum security prison was essential issue, and that since the order he had been returned there for other unrelated disciplinary charges, as order from which appeal was taken was not limited to granting inmate relief respecting his classification, but also prohibited prison officials from opposing any sanction or restriction against inmate relative to the disciplinary report filed by female staff member, a command to which defendants took vigorous exception.

2. Constitutional Law ⇐82(13)

First Amendment applies in prisons, but must be accommodated to the unusual conditions there. U.S.C.A. Const.Amend. I.

3. Constitutional Law ⇐82(13)

Even in presence of legitimate First Amendment concerns, considerable deference is due to the "expert" judgment of

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of _____, State of California. I am over the age of eighteen (18) years and not a party to the within action. My business address is _____

_____.

On August 26, 1994, I served the foregoing document described as NON-CALIFORNIA AUTHORITIES IN SUPPORT OF CHURCH OF SCIENTOLOGY INTERNATIONAL'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO GERALD ARMSTRONG'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION OF ISSUES on interested parties in this action,

[ ] by placing the true copies thereof in sealed envelopes as stated on the attached mailing list;

[X] by placing [ ] the original [X] true copies thereof in sealed envelopes addressed as follows:

FORD GREENE
HUB Law Offices
711 Sir Francis Drake Blvd.
San Anselmo, CA 94960-1949

MICHAEL WALTON
700 Larkspur Landing Circle
Suite 120
Larkspur, CA 94939

[ ] BY MAIL

[ ] *I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

[ ] As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

Executed on August 26, 1994, at Los Angeles, California.

[X] **(BY PERSONAL SERVICE) I delivered such envelopes by hand to the offices of the addressees.

[ ]** Such envelopes were hand delivered by Messenger Service

Executed on August 26, 1994, at Los Angeles, California.

[X] (State) I declare under penalty of the laws of the State of California that the above is true and correct.

[ ] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

_____ _____

Print or Type Name Signature

* (By Mail, signature must be of person depositing envelope in mail slot, box or bag)

** (For personal service signature must be that of messenger)